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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-5541

TULARE LAKE CANAL COMPANY and TULARE LAKE BASIN WATER STORAGE DISTRICT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners Tulare Lake Canal Company and Tulare Lake Basin Water Storage District respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on April 5, 1976.

Salyer Land Company, a defendant-appellee below, has filed a separate petition for a writ of certiorari which adopts the arguments advanced herein and advances addi-

tional arguments why a writ of certiorari should issue herein.

In addition, 26 other entities situated similarly to petitioner Tulare Lake Canal Company, to wit, public districts and private companies which deliver to water users, through irrigation canals and works, water from the Kings River in California, have agreed to be bound by the judgment in this case.

Opinions Below

The opinion of the Court of Appeals, reported at 535 F.2d 1093, appears in a separate appendix to this petition as Exhibit A. The opinion of the Court of Appeals denying motions for rehearing and for rehearing *en banc,* also reported at 535 F.2d 1093, appears in the appendix as Exhibit B. The opinion of the United States District Court for the Eastern District of California, reported at 340 F. Supp. 1185 (1972), appears in the appendix as Exhibit C.

Jurisdiction

The judgment of the Court of Appeals was entered on April 5, 1976. Timely petitions for rehearing were denied on June 7, 1976. On August 13, 1976, Mr. Justice Rehnquist extended the time to file this petition until October 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Jurisdiction in the District Court was based on 28 U.S.C. §1345.

Questions Presented

In the case at bar, after 2½ years of deliberation which resulted in an 87-page printed opinion, the Ninth Circuit has decided fundamental questions concerning federal reclamation law,* which questions a former Secretary of the Interior in 1961 described as having "transcendent importance in the administration of the Federal reclamation laws."

The Ninth Circuit, in a case of first impression, has decided those issues in a manner which will have a profound impact on the agricultural economy of this country. It has decreed both an expansion and extension of the "160-acre" limitation so as (1) to put in jeopardy the water rights of thousands of western farmers who entered upon reclamation projects and (2) to subject farmers, who never entered upon reclamation projects, to the acreage limitation where Congress never intended it to apply.

In the 19th century Congress determined that entrymen on public lands should be limited to obtaining patents for public lands which could not exceed 160 acres.

In 1902, when another Congress enacted the first federal reclamation statute, the magic figure of 160 acres as the ultimate permissible size of a farm on public lands held

* The term "federal reclamation law" generally refers to the Act of June 17, 1902, 32 Stat. 388 and subsequent congressional enactments amendatory or supplementary thereto. Most of those provisions are to be found in Title 43 of the United States Code. For purposes of this petition, the key provision of federal reclamation law is §46 of the Omnibus Adjustment Act of 1926, 43 U.S.C. §423(e) quoted in full at pp. 10-12, *infra.*

sway and became the basis for the acreage limitation of federal reclamation law.

> "Public lands on reclamation projects [were] made subject to entry under the homestead laws in tracts of 160 acres or less in order to preserve the public domain for actual settlers." (App., Ex. A, p. 46A).

A half century later, in the case at bar, the Ninth Circuit—in awe of the 160-acre farm as the ultimate objective of federal reclamation law—has rendered a decision which will deny to the farmers of this country the benefits to be derived by the utilization of the most advanced and efficient agricultural techniques on *privately owned* tracts of land which are far in excess of the limited acreage which had its origins in the determination of a 19th century Congress of the appropriate amount of *public* land to be made available to homesteaders. The Ninth Circuit did so although there is no clear congressional foundation for such expansion and although its action would fragmentize a successful community of farmers utilizing the technological advances of the last century to produce the most productive farmland on the continent.

The court below has determined, as a matter of statutory interpretation, that (a) as to all federal reclamation projects subject to §46 of the Omnibus Adjustment Act of 1926 (encompassing some 10 million irrigable acres) and (b) as to some 90 flood control projects built by the Army Corps of Engineers pursuant to congressional authorization contained in the Flood Control Act of 1944, any farmer receiving any irrigation benefits from such projects must sign a contract, in accordance with §46 of the 1926 Act, requiring the disposal of all of his landholdings in excess of 160 acres at a price excluding the incremental

value resulting from the existence of the project, or else be denied the irrigation benefits of such projects for any of his farmland in excess of 160 acres.

The court below reached this result in two steps: *first*, it determined that pursuant to federal reclamation law a farmer with holdings in excess of 160 acres could not relieve himself of that acreage limitation, as imposed by §46 of the 1926 Act, by prepaying his obligation to reimburse the United States for the cost of constructing the project in question, although by prepayment the farmer voluntarily gave up the subsidy available to him under federal reclamation law in the form of longer payout terms on an interest-free basis.*

The Ninth Circuit held (App., Ex. A, p. 49A):

> "Section 46 was intended [by Congress] to accomplish the redistribution of large privately owned tracts at prices substantially below the actual value of such lands at the time of sale."

Second, it determined that §8 of the Flood Control Act of 1944 applied to all *flood control* projects built under the direction of the Army Corps of Engineers and authorized by the 1944 Act and that the federal reclamation law governed the access of farmers to their own water notwithstanding that the Secretary of the Interior had not built any irrigation works—the congressionally imposed condi-

* It has always been congressional policy in connection with federal reclamation projects to require the beneficiaries to repay to the Government the costs of constructing the projects. But payment of these costs has always been permitted over an extended period of time as long as 40 years and on an interest-free basis. By "prepayment" as used in this petition we mean simply that the farmer, instead of taking full advantage of the liberal, interest-free payout terms provided by federal reclamation law has at some earlier stage repaid his entire obligation.

tion precedent to the application of federal reclamation law to such projects.

The Ninth Circuit went so far as to hold that §8 of the Flood Control Act of 1944 mandates the imposition of acreage limitations upon *privately owned water* stored behind a flood control dam even though there has never been any determination by the Secretary of War that the flood control dam and reservoir may be used for irrigation purposes, as is expressly required by §8.

In such fashion, the Ninth Circuit, by ignoring the will of Congress and the realities of the agricultural economy of 20th century America has, for those areas which cannot survive within the confines imposed by the 160-acre farm limitation, ordered a counter-revolution in American agriculture.

Unless the decision of the court below is reversed, numerous large privately owned tracts of land throughout the United States, which are today farmed with the most advanced and efficient agricultural techniques available, at great savings in cost to the consumer, and even farms of moderate size, will no longer be able to exist in their present form.

Unless the decision below is reversed, the agricultural community directly involved in the case at bar—an agricultural community in the State of California of more than 1.1 million acres containing some of the most fertile and productive land in this country, will be economically devastated. There are farms in that community which are measured in miles, not in acres—and there is just no way

those fertile and productive lands will be able to continue to produce their bountiful harvest if they must be broken up into 160-acre tracts (see pp. 25-28, *infra*).

Moreover, the devastation of this agricultural community will take place, although for an extended period of time during the 1940's and 1950's, responsible officials of the Department of the Interior reassured the farmers of that community that, pursuant to established rulings and practices of that Department, prepayment of the farmers' obligations for the cost of constructing the project in question would relieve them of the acreage limitations of federal reclamation law and the farmers, to their financial detriment, relied on those assurances (see pp. 15-20, *infra*).

Before the enormous and disastrous consequences of such a result are visited on the agricultural economy of this country, this Court should order a full review of the questions presented in this case to determine for itself whether the Ninth Circuit has correctly divined the congressional intent on these subjects. And, in these circumstances it is not presumptuous, we submit, to suggest that the United States which commenced this lawsuit as a "test" case should join us in seeking such a full review by this Court.

Specifically, the questions presented are:

1. Did Congress intend, by §8 of the Flood Control Act of 1944, to apply the acreage limitation provisions of federal reclamation law to all dams authorized by that Act? Did Congress intend that all recipients of any so-called "irrigation" benefits from dams built by the Army Corps of

Engineers under the 1944 Act not be entitled to receive any such benefits for their landholdings in excess of 160 acres?

2. Does the term "irrigation purposes" as used in §8 of the 1944 Act apply to the storage of privately owned water behind a flood control dam? If so, what did Congress intend when it used the term "conservation storage" in §10 of the 1944 Act?

3. Did Congress intend, by §46 of the Omnibus Adjustment Act of 1926, that farmers receiving any irrigation benefits from a federal reclamation project must agree to divest themselves of farmland owned by them in excess of 160 acres, or else be deprived of such irrigation benefits for their "excess" farmlands, even though the farmers (through the irrigation units which deliver water to them) have prepaid their allocable share of the construction costs of the dam and have thereby voluntarily forsaken the subsidy available to them under federal reclamation law by way of longer payout terms on an interest-free basis? Did Congress intend, by §46 of the 1926 Act,

> "to accomplish the redistribution of large privately owned tracts at prices substantially below the actual value of such lands at the time of sale" (App., Ex. A, p. 49A)?

4. Should a long-standing Executive interpretation of a federal statute, as well as established Executive policies and practices in furtherance of that interpretation, be overturned when private citizens, to their financial detriment, have long relied on the Executive's interpretation, policies and practices?

Statutes Involved

Section 8 of the Flood Control Act of 1944, 58 Stat. 887, 891, 43 U.S.C. §390, provides:

> "Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the cost of the structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirements shall not prejudice lawful uses now existing: *Provided*, That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the Army Engineers, which provides conservation storage of water for irrigation purposes."

Section 10 of the Flood Control Act of 1944, 58 Stat. 887, 901 (the provision of the 1944 Act which gave specific authorization for construction of the Pine Flat Dam, the flood control project at issue in this case) provides, in pertinent part:

> "The project for flood control and other purposes for the Kings River and Tulare Lake Basin, California, is hereby authorized substantially in accordance with the plans contained in House Document Numbered 630, Seventy-sixth Congress, third session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable at an estimated cost of $19,700,000: *Provided,* That the conditions of local cooperation specified in said document shall not apply: *Provided further,* That the Secretary of War shall make arrangements for payment to the United States by the State or other responsible agency, either in lump sum or annual installments, for conservation storage when used: *Provided further,* That the division of costs between flood control, and irrigation and other water uses shall be determined by the Secretary of War on the basis of continuing studies by the Bureau of Reclamation, the War Department, and the local organizations."

Section 46 of the Omnibus Adjustment Act of May 25, 1926, 44 Stat. 649, 43 U.S.C. §423(e), provides:

> "No water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and

maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid within such terms of years as the Secretary may find to be necessary, in any event not more than forty years from the date of public notice hereinafter referred to, and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. Prior to or in connection with the settlement and development of each of these projects, the Secretary of the Interior is authorized in his discretion to enter into agreement with the proper authorities of the State or States wherein said projects or divisions are located whereby such State or States shall cooperate with the United States in promoting the settlement of the projects or divisions after completion and in the securing and selecting of settlers. Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of Interior: and that until one-half of the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior and that upon proof of fraudulent representation as to the true consideration in-

volved in such sales the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sales: *Provided further,* That the operation and maintenance charges on account of lands in said projects and divisions shall be paid annually in advance not later than March 1. It shall be the duty of the Secretary of the Interior to give public notice when water is actually available, and the operation and maintenance charges payable to the United States for the first year after such public notice shall be transferred to and paid as a part of the construction payment."

Statement of the Case

This lawsuit, commenced by the United States in 1963, is concededly a "test" case—brought for the express purpose of obtaining a *judicial* determination of two fundamental issues concerning (1) the proper construction of federal reclamation law, and (2) the proper construction of the Flood Control Act of 1944, which we have previously described. It is of great significance, we submit, that this case was started after a period of almost two decades during which various departments within the Executive branch could not agree on the proper resolution of those two issues. During these two decades, officials of various departments of the Executive branch and sometimes officials within the same department, issued opinions and decisions directly in conflict with each other with respect to those two issues. And, as we demonstrate shortly, on the "prepayment" issue in this case, this lawsuit was precipitated by an opinion of a new Solicitor of the Department of the Interior in 1961 repudiating the Department's policy on "prepayment" which had been firmly established for almost 15 years.

Authorization of the Pine Flat Dam

In the late 1930's, the federal government undertook to study the need for a dam on the Kings River in California. Over the course of several years of debate concerning this project, officials of the Roosevelt Administration repeatedly and insistently urged that Congress authorize the dam as a reclamation project whose construction and control would be within the jurisdiction of the Bureau of Reclamation, and the costs of which would be reimbursed to the Government under the provisions of federal reclamation law.

In 1944, Congress rejected the Administration's pleas. It determined that the Pine Flat Dam should be built on the Kings River; but it also determined that the dam should be constructed by the Army Corps of Engineers based on an express congressional finding that the principal purpose of that dam would be to alleviate the disastrous flooding that occurred periodically in the portion of the San Joaquin Valley in California through which the Kings River flowed.

In authorizing construction of the Pine Flat Dam, Congress, however, did concede one fact to the Administration: it recognized that the Pine Flat Dam would provide some derivative and secondary irrigation benefits to farmers in the Kings River service area by regulating the flow of water on the Kings River. In recognition of this fact, §10 of the 1944 Act, the specific authorization statute for the Pine Flat Dam, provided:

> "That the Secretary of War shall make arrangements for payment to the United States by the State or other responsible agency, either in lump sum or annual installments, for conservation storage when used: *Pro-*

vided further, That the division of costs between flood control, and irrigation and other water uses shall be determined by the Secretary of War on the basis of continuing studies by the Bureau of Reclamation, the War Department, and the local organizations."

The Repayment Contracts

In the years that followed, efforts to negotiate the payment arrangements called for by §10 were unsuccessful. At first, they were unsuccessful because: (a) there was a direct conflict within the Administration concerning the meaning of §8 of the 1944 Act; the Department of the Army maintained that the acreage limitations of federal reclamation law did not apply to the Pine Flat Dam;* the Bureau of Reclamation took exactly the opposite position;** and

* The Department of the Army maintained this position from the day the statute was enacted. In 1957, the Department of the Army committed its views to paper, in a 28-page analysis of the pertinent provisions of the Flood Control Act of 1944 and of the legislative history of that statute (R.A. 143-170). ("R.A." refers to pages in the record on appeal in the court below.) We may note that the Department of the Army was thoroughly conversant with all aspects of the Pine Flat Dam project. In 1940, the Department's Corps of Engineers in a report to Congress had recommended construction of the dam as a flood control project (P. Ex. 4) ("P. Ex." refers to plaintiff's exhibits in the District Court), and in §10 of the 1944 Act Congress authorized construction of the dam "substantially in accordance with the plans contained" in the Corps of Engineers' report.

** One reported anecdote illustrates the intensity of this disagreement within the Executive branch. In a book written in 1972 entitled *The Bureau of Reclamation,* William E. Warne, a former Assistant Commissioner of the Bureau, recounted that (pp. 184-185):

> "One night, after the Flood Control Act of 1944 had been signed, an assistant commissioner of reclamation met with a group of irrigators in Fresno, California, to explain to them the provisions of the reclamation law, which, he said, now would govern the sale of water from Pine Flat Dam, just authorized for construction by the Corps of Engineers. The assistant chief

(footnote continued on next page)

(b) by Presidential fiat, the Secretary of the Interior replaced the Secretary of War (the person expressly designated by Congress) as the federal agent to negotiate the repayment contracts.

In those circumstances, the farmers in the Kings River service area were not willing to negotiate a contract with the Secretary of the Interior. The Secretary had adopted the position of his Bureau of Reclamation on the issue of acreage limitations, while the farmers shared the view of the Department of the Army, that acreage limitations did not apply to the area served by the dam.

The Cohen Opinion and Its Progeny

On October 22, 1947, the then Associate Solicitor for the Department of the Interior, Felix Cohen, a distinguished lawyer and scholar, issued an opinion (relying upon prior decisions and practices) which held that the acreage limitation provisions of federal reclamation law would be lifted and become inapplicable when local water users paid to the Government, in a lump sum, that portion of the cost of any particular project allocable to irrigation benefits (D. Ex. F18).* The Department of the Interior promptly sent the

of Engineers, General Robins, walked in. He grew redder of face by the moment as the Bureau representative explained that Section 8 of the Flood Control Act—as he read it—provided that the Bureau would market the water service under the reclamation laws.

> 'You know damned good and well that isn't so,' the General burst forth.

The meeting ended abruptly in confusion. After almost three decades, the question as to which of the speakers was right has still to be settled by the federal courts."

* "D. Ex." refers to defendant's exhibits in the District Court.

Cohen opinion to the Bureau of Reclamation's Regional Directors as authority for lump-sum payout as an alternative to the execution of contracts requiring farmers to dispose of their holdings in excess of 160 acres.

For the Kings River water users, lump-sum payout in accordance with the Cohen opinion (already authorized by §10 of the 1944 Act) was a solution to their problem. Rather than continue the debate as to whether §8 of the 1944 Act imposed acreage limitations, the local water users commenced negotiations with the Department of the Interior looking toward a repayment contract which would require lump-sum prepayment of construction charges, but which would not impose any acreage limitations. By 1955, a draft contract had been prepared.

Then, at the request of Congress, the Department of the Interior undertook another review of the propriety of the lump-sum prepayment provision of this draft contract with the Kings River water users. The Department's conclusions were embodied in a two-volume report entitled "Excess Land Provisions of the Federal Reclamation Law and the Payment of Charges," dated May, 1956 (P. Ex. 84). The report exhaustively documented the history of the negotiations with the Kings River water users to that date, set forth the applicable statutes and administrative decisions, described various instances in which similar "pay-out" provisions were embodied in Government contracts with other farmers on other dams, and concluded:

> "The proposal contained in the repayment contract arrangements negotiated with the Kings River Conservation District is simply that when and to the extent

> construction charges repayable under that contract are paid to the United States, the lands with respect to which full payment is made will no longer be subject to the excess-land limitation of the federal reclamation laws. Development of this phase of the proposed contract constitutes the application of a principle which is consistent with a policy of long standing and which is compatible with the construction of Acts of Congress as they have been interpreted by administrative officials and legal staffs of the Department over a long period of years."

In the 1955 draft contract, the water users (acting through the Kings River Conservation District, a public district created for the express purpose of negotiating a repayment contract with the United States) and the Bureau of Reclamation agreed that an *individual farmer* would be relieved of acreage limitations if *he* paid *his share* of the capital cost of the project allocable to irrigation benefits. The italicized portions of the proposed contract set forth above were its downfall. When, in June, 1957, the Secretary of the Interior asked Solicitor Bennett to render an opinion on the validity of the contract, Solicitor Bennett determined that §46 of the 1926 Act prohibited contracts with *individual holders* of excess land and ruled, accordingly, that the contract was not in proper form. But Solicitor Bennett did not reject the principle of prepayment; on the contrary, he endorsed it, stating (D. Ex. P20):

> "It is the payment of the full obligation by the district under the 1926 Act joint-liability repayment contract, as well as the similar payment under the 1912 Act individual contracts, that relieves the excess land from the statutory restrictions."

The Department of the Interior subsequently reassured the Kings River water users that lump-sum prepayment by the water districts in the Kings River service area would lift the acreage limitations of federal reclamation law (*e.g.*, D. Ex. H4; D. Ex. MM; D. Ex. TT; D. Ex. U20; D. Ex. W20).

Finally, in 1960 a permanent contract which was acceptable to both the United States and the water users and which provided for prepayment, but contained no acreage limitations, was drafted. The Kings River water users approved the draft on October 17, 1960. On January 3, 1961 still another Solicitor's opinion—this one by Solicitor Stevens—corroborated that a lump-sum prepayment by the water districts would remove the acreage limitation restrictions of federal reclamation law (D. Ex. Y5).

On January 19, 1961, the outgoing Secretary of the Interior, Fred Seaton, fully endorsed the view that prepayment relieved excess landowners of acreage limitations and he approved the draft contract between the United States and the Kings River water users, but he determined that because of the "transcendent importance in the administration of the Federal reclamation laws" of the prepayment question, execution of the contracts should be deferred pending review by the incoming Attorney General, Robert Kennedy. Secretary Seaton wrote to Attorney General Kennedy as follows (D. Ex. Y5):

> "The legal officers of this Department have consistently been of the view that the restrictions of the excess land provisions do not continue beyond the date of payout of its construction charge obligation to the United States by the contracting entity. Enclosed are

the several legal opinions in which this position has been expressed. These are:

> Will R. King, Chief Counsel, approved July 22, 1914, 43 LD 339
>
> Felix S. Cohen, Associate Solicitor, October 22, 1947, M-35004
>
> Elmer F. Bennett, Solicitor, July 10, 1957, M-36457
>
> Theodore F. Stevens, Solicitor, January 3, 1961

Notwithstanding the views continuously expressed by the principal law officers of this Department, the opposite point of view has been earnestly and repeatedly pressed upon this Department. The earnestness and insistence with which these contrary views have been pressed, together with the widespread interest in the question and its transcendent importance in the administration of the Federal reclamation laws, prompt me to request your consideration of the matter in order that it may definitively be set at rest within the Executive Branch."

Attorney General Kennedy referred the proposed contract to the new Secretary of the Interior who, in turn, referred it to his new Solicitor. On December 26, 1961, the new Solicitor, Frank Barry, issued an opinion disapproving the proposed contract. The opinion, in blunt terms, was a complete reversal of the Government's position *vis-a-vis* the Kings River water users and a rejection of 15 years of repeated analysis and rulings by the Department of the Interior on the subject of lump-sum prepayment.

Attorney General Kennedy, however, subsequently approved Solicitor Barry's opinion.

Thus, years of negotiation had produced no final result —except to reveal within the Executive branch of the Government a deep-seated conflict concerning the issues of federal reclamation law which the Ninth Circuit decided in the case below.*

The existence and the nature of that conflict as set forth above are, we suggest, more than an adequate reason why this Court should grant this petition. Whatever the position of the United States today, for two decades it has been a house divided against itself.

The Test Case

After the issuance of the Barry opinion, the Government and the Kings River water users determined that the only method to resolve their impasse was to have the matter decided by the federal courts in a test case.

* While no permanent contract was entered into, beginning with the completion of the Pine Flat Dam in 1954 and continuing through 1963, the United States and the water users agreed to annual, interim contracts providing for payment for conservation water storage. The payments agreed upon far exceeded the cost of operation and maintenance of the dam, and the payments in excess of operation and maintenance costs were to be credited to the water users' repayment obligation upon the execution of a permanent contract. In effect, then, a prepayment installment plan was agreed to and, on an interim, annual basis, was carried out over a period of almost ten years. By December, 1961, the date of the Barry opinion, these prepayments amounted to more than $5,320,000; when the permanent contract was signed in 1963, the water users had prepaid almost one-half of their $14,250,000 repayment obligation; such payments now amount to almost $12 million. In this manner and to this degree, the Kings River water users paid to the Government enormous sums of money in reliance upon repeated assurances, based on repeated rulings of law, that a permanent contract would be executed which provided for prepayment but not acreage limitations. It was for this reason that the District Court found that the Government was estopped from asserting that acreage limitations applied to Pine Flat Dam (R.A. 2607-2609, 2611-2612).

Thus, in December of 1963, the United States and 28 water divesting entities on the Kings River entered into a series of contracts, which included the following provisions:

1. The 28 entities paid or agreed to pay the United States $14,250,000 for the "perpetual and exclusive irrigation storage use" of the reservoir, which use was subordinate to the use of the reservoir for flood control.*

2. The United States and the 28 entities entered into an agreement whereby the entities agreed to be bound by a test case litigation.

3. The United States and the Tulare Lake Canal Company entered into the "test case contract" which precipitated this lawsuit. In that contract, the Tulare Lake Canal Company agreed to and did pay the United States the balance due on its total obligation, thus setting the stage for a test of the "prepayment" issue; the company also agreed not to deliver any stored water to any excess lands; however, the parties further agreed that this restriction would be void *ab initio*, if the laws of the United States at the time of the contract did not prohibit the delivery of stored water to such excess lands (D. Ex. I, Tab 18).

After the test case contract was signed, the Tulare Lake Canal Company deliberately delivered stored water to an excess landowner which, in the presence of government witnesses, was used on more than 160 acres of land. On December 30, 1963, seven days after the test case contract

* The District Court found that payment of $14,250,000 "will fully reimburse to the United States the capital costs of the project allocated in accordance with law to irrigation storage use." (R.A. 2593).

was signed, the United States filed this action against the company seeking an injunction (R.A. 10):*

> "Permanently restraining and enjoining the defendant Tulare Lake Canal Company, its officers, agents, servants, employees and all persons in active concert or participation with them, from delivering stored water released to it from Pine Flat Dam and Reservoir to any lands in excess of 160 acres in one ownership unless under conditions permitted by the provisions of the annexed contract and the applicable laws of the United States."

The Trial

The case was tried from May 4 to May 14, 1971 in the United States District Court for the Eastern District of California. On its direct case, the United States introduced into evidence the relevant contracts and statutes and certain supplementary material. On defendants' case, testimony and other evidence was adduced which, among other things, established the following:

The geography of the Kings River service area is dominated by two natural phenomena.

* In precise terms, the Tulare Lake Canal Company is a California mutual water company which delivers to its shareholders, through canals and works owned by it, Kings River water appropriated under vested, nonappurtenant water rights for use in irrigation. The company is one of the 28 entities which have contracted with the United States for the exclusive and perpetual storage use of Pine Flat Dam for irrigation purposes, such contracts in the aggregate exhausting the entire capacity of Pine Flat Dam for the storage of water for irrigation purposes. The Tulare Lake Basin Water Storage District, an intervenor-defendant below, is another of the 28 contracting entities. Salyer Land Company, an intervenor-defendant below, owns land in the Kings River service area in excess of 160 acres.

First, the area is subject to periodic flooding of severe proportions. Floods occur both in the winter, as a result of intense rainfall, and in the late spring, as a result of melting snow. These floods are so severe that they have continued even after the completion of the Pine Flat Dam in 1954. Extensive flooding occurred in 1955, 1956 and 1958. Even more severe floods took place in 1966-67 and again in 1969-71, causing damages to crops alone of more than $12.5 million* (Tr. 108-09, 114-16, 135, 567, 595).**

The second natural phenomenon is the Tulare Lake Basin, into which the Kings River flows. This basin is the sump of a drainage area; its bed is impervious to seepage, and it is practically level. Accordingly, when the Basin is flooded, as it has been on numerous occasions, even after construction of the Pine Flat Dam, the only processes by which the flood waters recede are natural evaporation or physical removal of the flood waters—processes which can take and have taken two to three years during which the land cannot be farmed (Tr. 564-66).

In 1850, the Basin was owned by the federal government. It was then a fetid swamp, which overflowed periodically and whose water level otherwise was subject only to the process of evaporation. In that year, Congress passed an act which granted to the states certain swamp and overflow lands, including the Tulare Lake Basin to the State of California.† California in turn enacted a number of statutes

* Had Pine Flat Dam not been built, the loss of property from the great flood of 1969 would have run into the hundreds of millions of dollars. The entire cost of construction of the dam was justified many times over in 1969 alone.

** "Tr." refers to pages in the trial transcript.

† The special situation of the swamp and overflowed lands of the Tulare Lake Basin under the Act of September 26, 1850 is treated at length in the petition of Salyer Land Company this day filed.

between 1855 and 1893 which made this land available to private settlement. Title to the land subsequently was acquired by individuals in accordance with these statutes (Tr. 763-65).

Beginning at the end of the nineteenth century, the owners of land along the Kings River expended great effort and vast amounts of money to establish a system of controlled irrigation, to lessen the hazard of periodic flooding and to reclaim the Basin swampland. By 1900, 360,000 acres were under irrigation and reclamation had begun in the Tulare Lake Basin itself. In 1920, 820,000 acres were being irrigated. In 1927, the Kings River Water Association was formed, and the local water users agreed among themselves as to their respective rights to the water flowing from the River. By 1950—before the Pine Flat Dam was completed—950,000 of the area's 1.1 million acres were under private irrigation. The total cost of this effort was more than $70 million, all of it borne by local farmers—not one penny of it borne by either the federal government or the State of California (Tr. 110-13).

In short, the farmers of the Kings River service area, at enormous cost to themselves, and to no one else, had transformed that area, and the Tulare Lake Basin in particular, into one of the most highly productive agricultural communities in the United States (Tr. 123-24 and Int. Ex. IQ).*

Despite these great efforts, flooding continued to be a serious hazard to life and to property. During the bad flood years of 1938-41, the local populace turned to the federal government for help (P. Ex. 4).

* "Int. Ex." refers to exhibits introduced in the District Court by the intervenor-defendants.

The trial also established the many reasons which prompted Congress in 1944 to reach the decision that the Pine Flat Dam was to be deemed a flood control project and to be constructed by the Army Corps of Engineers. As the District Court wrote (App., Ex. C, pp. 95A-96A):

> "1. Studies showed flood control benefits to be greater than irrigation benefits.
>
> "2. The Government claims no water rights in the Kings River.
>
> "3. All the water rights to the Kings River are vested in the water users.
>
> "4. The dam would not create supplemental water which could be sold by the Government.
>
> "5. Arid land would not be reclaimed by reason of the dam being built.
>
> "6. All the canals and ditches carrying water from the Kings River to the farms are owned by the water users.
>
> "7. 200,000 acres known as the Tulare Lake Basin are subject to flood and drought, and are not adaptable to actual settlement as contemplated by the reclamation laws."

Indeed, as the trial established, the only irrigation benefit to be derived from the dam resulted from the more regular flow of water, a result which could be derived from virtually any flood control project.

Finally, the trial established this singular fact: substantial portions of the Kings River service area—indeed, the bulk of the area which today is owned in landholdings in excess of 160 acres—could not be farmed in tracts of 160

acres or less. If any effort were made to farm those lands in tracts of those sizes, the result would be economic disaster (Tr. 122-26, 130, 183, 602-03).

For example, in the southern portion of the Kings River service area, farmers have tried to farm on small tracts, but have never been successful. The soil conditions there are suitable only for field crops, which are not conducive to small-scale farming. A farmer must be prepared for both flood and drought, both in terms of equipment and the ability to bear the loss of a crop, of a season, or even of several consecutive seasons when farming will be impossible because of continued flood conditions (see p. 23, *supra*)* (Tr. 595-97).

There is no potable ground water in the area, and development of a domestic water system is exceedingly expensive. Finally, the capital investment required to farm 320 acres, including payment for land, small equipment, water rights, and private water distribution facilities, was estimated at trial to be (in 1971 dollars) $300,000 (Tr. 598-601).

These factors have dictated a pattern of large-scale farming in the southern half of the Kings River service area** (Tr. 122-23, 143-45).

* One man who attempted to farm in the Tulare Lake Basin on a small scale recounted at trial how he and his parents decided during one of the flood periods to give up: "It was the kind of experience where you had water on both sides of you and they decided to move out and I don't blame them" (Tr. 651). Another small farmer was asked at trial what would have happened had he stayed on in the area, and he replied: "I'd be bankrupt today" (Tr. 676).

** The Ninth Circuit noted this fact, pointing out that the bulk of the so-called "excess holdings" in the Kings River service area were in the southern portion of the area and primarily in the Tulare Lake Basin (App., Ex. A, p. 2A).

The District Court made extensive findings of fact on all the matters we have heretofore discussed (R.A. 2588-2600).

The importance of these findings, which were not disturbed on appeal, is that they illustrate a proposition we urged earlier: the Ninth Circuit's decision will cause economic devastation in a substantial portion of the Kings River service area. The land cannot be farmed in small 160 acre tracts; it cannot become, as the Government suggested at the beginning of the trial, the new home for the "people in the ghettos and inner-cities of the United States" (Tr. 34).

The District Court found (and, as we noted, its finding was not disturbed on appeal) (R.A. 2610):

> "It is infeasible and would produce bizarre and absurd consequences if an attempt were made to impose acreage limitations and family-farm settlements within the Tulare Lake Basin."

If such an attempt were made, large amounts of land would simply go out of cultivation (Tr. 602).*

* The Bureau of Reclamation's own studies agree that small-scale farming just will not work in those portions of the Kings River service area which are now held in excess of 160 acres and would be disastrous to the small farmers who tried and to the general agricultural economy of this highly productive area. In September, 1941, for example, the Commissioner of the Bureau of Reclamation advised the Secretary of the Interior as follows (D. Ex. L11): "The Reclamation Law limits the individual holdings on a project to 160 acres. This limitation is probably unwise for all parts of the Kings River area. For example, subdivisions and settlement of the Tulare Lake bed would be hazardous . . ." The Bureau's studies subsequent to the authorization of the dam were even more pointed. In April, 1947, a study of the Basin area concluded that,

(footnote continued on next page)

In these circumstances, whatever else the consequences of the Ninth Circuit's decision may be, one consequence will *not* be to open large tracts of privately owned land for settlement by persons of modest means.

Reasons for Granting the Writ

The court below has decided important questions of federal law which have not been but should be settled by this Court.

A. Section 46 of the 1926 Act—the "Prepayment" Issue

The decisions below—the District Court's decision and the Ninth Circuit's reversal—are the only judicial determinations that have been made of the "prepayment" issue.

The Ninth Circuit frankly recognized the broad scope of its decision. It wrote (App., Ex. A, p. 43A):

> "We consider next whether, by repaying construction charges, owners of excess lands may avoid the obligation under section 46 to execute recordable contracts with the Secretary of the Interior providing for the sale of their excess lands at ex-project prices. This is the more far-reaching of the two grounds for the

even "assuming a dry year," "a 160-acre farm unit is too small to provide an adequate farm family living over and above operating costs" (D. Ex. N). And in September, 1947, the Regional Supervisor in Sacramento concluded that no distinction could be made between the Basin area and the balance of the Kings River area in terms of the impracticality of the 160-acre limitation (D. Exs. Q and R). (Because the Bureau's position at that time was that the Pine Flat Dam was subject to the acreage limitations pursuant to the Flood Control Act of 1944, the September, 1947 study recommended that the Department of the Interior introduce in Congress legislation exempting the dam from the acreage limitations.)

> district court's decision *since it affects all federal reclamation projects subject to section 46 of the 1926 Act,* not just those authorized in the Flood Control Act of 1944." (Emphasis added)

And in a footnote, the court below said (App., Ex. A, p. 43A):

> "Section 46 of the 1926 Act is, with few exceptions, applicable to all projects built after 1926. These projects contain the vast majority of lands receiving water from federal reclamation projects. In 1924 only about 1,300,000 acres were under irrigation in federal reclamation projects. Federal Reclamation by Irrigation, S. Doc. No. 92, 68th Cong., 1st Sess. 60 (1924). By 1970 almost 8,570,000 acres were receiving either full or supplemental water service from federal projects, and 10,198,000 irrigable acres were available for service. Hogan, *supra* note 81, at 1. Private lands included in the 7 million acres brought under irrigation since 1924 are covered by §46 of the 1926 Act unless the particular project is expressly exempted. Private lands have always predominated in federal reclamation projects, especially in more recent projects. *See, e.g.,* Acreage Limitation Policy, *supra* note 9, at 82-83."

We have already noted the fundamental impact that the Ninth Circuit's decision will have on the agricultural economy of reclamation projects covered by §46 of the 1926 Act by mandating the elimination of large-scale farms in individual ownership (see p. 6, *supra*).

And we have already noted the sharp conflict between the Ninth Circuit's decision and the long-established administrative rulings and practices of the Department of the Interior which were not repudiated until 1961 (see pp. 15-20, *supra*).

The Ninth Circuit, to be sure, took issue with our contentions concerning those long-established rulings and practices, suggesting that except for a brief period in the 1950's, those rulings and practices on prepayment did not prevail. This is not the occasion to debate that issue at extended length, but is the occasion, we submit, for this Court to recognize the importance of the result reached below and the need for full review by this Court.

The Ninth Circuit, we suggest, recognized the significance of the conflict between its decision and prior administrative rulings and practices by the lengths to which it went to explain away the 1947 opinion of Associate Solicitor Felix Cohen. After an analysis of the reasoning behind the Cohen opinion, the court below wrote (App., Ex. A, p. 81A):

> "The surprising superficiality of the Cohen opinion may be explained by the political context in which it was issued. It appears to have been a hastily contrived means to achieve an end thought to be of overriding importance to the Department. *For whatever reasons, the Bureau of Reclamation had not moved as decisively or uniformly as it might have to enforce acreage limitations. A survey of reclamation projects completed in 1946 and a conference of key Bureau personnel in early 1947 revealed substantial noncompliance with the acreage limitations on many projects.* Senator Downey of California and others were marshaling support for a renewed attempt to entirely exempt projects in California, Colorado, and Texas from acreage limitations. Department and Bureau officials wished to present a record of enforcement to Congress as part of an overall defense of acreage limitation pro-

> visions. It was considered impracticable at that late date to secure the individual recordable contracts the Bureau had failed to require as a precondition to delivering project water when projects were first opened. The Cohen opinion was prepared as a part of a program to meet this problem. *It was transmitted to field offices to provide a means for achieving rapid 'compliance' with acreage limitations which could then be reported to Congress, albeit 'compliance' by avoidance through payment of construction charges."* (Emphases added)

This passage from the opinion below suggests additional compelling reasons why this Court should grant the petition. If beginning in 1947, the Department of the Interior used "prepayment" as a means for remedying what until then had been "substantial non-compliance" with acreage limitations on federal reclamation projects, the decision below has cast grave doubts on what is *now* to be done in all those situations where "prepayment" was used.

Under the Ninth Circuit's decision, any "prepayment" contracts entered into by the Department of the Interior with landowners which did not include acreage limitations were surely unauthorized and illegal and may very well be void. All of the rights of excess landholders under those contracts have now become unsettled.

Moreover, to the extent, if any, that the rights of such excess landowners are not disturbed—if other landholders have been able to lift acreage limitations by "prepayment" but the farmers of the Kings River service area are now to be denied that right—then the Ninth Circuit's decision poses problems of discrimination and forfeiture of constitutional dimension.

In other respects, the Ninth Circuit's decision raises questions of constitutional dimension which should be determined by this Court. The Ninth Circuit took the view that one of the basic goals of federal reclamation law was a species of "land reform"—to create family-sized farms in areas irrigated by federal projects. The court below went even further. It wrote (App., Ex. A, p. 49A):

> "Section 46 was intended to accomplish the redistribution of large privately owned tracts at prices substantially below the actual value of such lands at the time of sale."

But whatever the congressional power to achieve such results on public lands by acreage limitations, or to achieve such results on private lands by conditioning the federal subsidy of a reclamation project on compliance with acreage limitations, a totally different problem emerges as to private land and privately owned water rights where the landowners have prepaid the United States in full for the "perpetual and exclusive irrigation storage use" of a flood control reservoir subordinate only to the use of the reservoir for flood control, thereby forsaking any federal subsidy.

To put it another way, when *private* landowners have repaid the federal government in full for the costs of a reclamation project or for the allocable costs of the irrigation benefits of a flood control project, by what constitutional mandate may Congress still insist on "land reform" or the "redistribution of large privately owned tracts" of land by means of the continued imposition of acreage limitations on those private landowners? Under the Constitution, Congress may have the power to impose reasonable

conditions on citizens who are the beneficiaries of the expenditure of Government funds, but we respectfully submit that under the Constitution, Congress does not have the power to decree the confiscation of private property—the redistribution of land "at prices substantially below the actual value of such lands at the time of sale"—after the private landowners have fully discharged their specific monetary obligations to the Government for the cost of constructing a federal reclamation project. This issue assumes even greater significance when the project involved is not even a reclamation project—but a flood control project concerned with privately owned water as to which the Government has no interest.

In a case where the intent of Congress surely could not have been what the Ninth Circuit divined it to be and where various officials of the Executive branch have offered conflicting opinions as to what Congress intended, the Ninth Circuit's decision on the "prepayment" issue surely is worthy of review by this Court.

B. Section 8 of the 1944 Act

The Ninth Circuit's interpretation of §8 of the 1944 Act may not have the same vast implications as its decision on the "prepayment" issue, but it nonetheless affects 90 projects authorized by the 1944 Act, including the Pine Flat Dam project which by itself involves a service area of 1.1 million acres.*

The Ninth Circuit's decision will have the same impact on these 90 flood control projects which were authorized

* Since §8 appears to be a statutory provision of general applicability, it may well apply to each and every flood control project authorized by the Congress anywhere in the United States since the enactment of the 1944 Act.

throughout the United States as it will have on all reclamation projects subject to §46 of the 1926 Act—it will mandate the elimination of large-scale farms in individual ownership. In the case of the Kings River service area, it will destroy the settled economy of an important agricultural community (see pp. 25-28, *supra*).

In the case of the Kings River service area, this destruction will take place, despite the fact that all of the irrigation works and canals in that area were privately constructed and privately paid for and despite the highly significant fact that the Government has *no* water rights of any kind in the Kings River, all of the water having been privately appropriated long before the Pine Flat Dam was authorized and constructed.

And all of these results will flow, we submit, from the Ninth Circuit's misreading of the legislative history of the Flood Control Act of 1944 and its misunderstanding of the nature of the "compromise" between the Roosevelt Administration and Congress reflected in §§8 and 10 of the 1944 Act.

In the final analysis, the Ninth Circuit's decision is based on its misconstruction of a portion of the third sentence of §8 of the 1944 Act. That sentence, in pertinent part, reads:

> "Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section. . . ."

The Ninth Circuit would have that sentence read (App., Ex. A, p. 39A):

> "*All* dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with *federal reclamation law*. . . ."

To achieve this feat of statutory construction,* the Ninth Circuit engaged in a lengthy analysis of legislative history, but we respectfully submit it misread the history it relied on and it ignored a great deal of history which would have demonstrated the error in its interpretation of §8.**

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* This may well be a case, as Mr. Justice Frankfurter once pointed out,

> "for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." *Greenwood* v. *United States*, 350 U.S. 366, 374 (1956).

** Respect for this Court's time precludes a review of the legislative history which the Court of Appeals ignored or mischaracterized. Illustrative of this history are the remarks of the Chairman of the House Flood Control Committee, Congressman Whittington during debate on the Flood Control Act of 1944 (90 Cong. Rec. 4123-4124 and 4209):

> "The testimony discloses that the Bureau is anxious to be authorized to construct the works along [the Kings River]. Fundamentally the Bureau of Reclamation is concerned with the development of public lands. Along Kings and Kern Rivers there is no public lands. There are no Federal reclamation projects. The people in these valleys have constructed and operated their own reclamation projects and they oppose the supervision of their projects by the Bureau of Reclamation or by any other Federal agency. I commend the people of the valley for providing for their own needs to cultivate their lands rather than coming to Congress to do for them what they can better do for themselves. The committee held repeated hearings. With one accord, the citizens of both valleys advocated the project as recommended by the Chief of Engineers in preference to the project as recommended by the Bureau of Reclamation. The committee felt that flood control was dominant. . . .
>
> * * *
>
> "There are items in this bill for the protection of the magnificent valleys of the Kings and Kern Rivers, where the people for more than 75 years have constructed their own local protective works, where millions of dollars have been invested in local protection works."

In particular, the Ninth Circuit ignored all of the legislative history which demonstrated that Congress' principal concern was not to make all of federal reclamation law, including acreage limitations, applicable to all of the 90 flood control dams it was authorizing in the 1944 Act.

The compromise that the Roosevelt Administration achieved was that: (a) if the Secretary of War should determine upon the recommendation of the Secretary of Interior that a flood control project could be used for irrigation purposes by the construction of additional works* (which means that there is potentially a water supply available for appropriation by the United States which it can develop and offer for sale to potential water users), after such a determination by the Secretary of War, the Secretary of Interior may then make an appropriate report and findings to Congress** and seek congressional authority to construct additional works and develop a reclamation project, which, in essence, would constitute the *sale* of water by the United States; if the Congress should authorize such a project, then the whole panoply of federal reclamation law,

* In the Kings River service area, no new additional works were necessary. They were already there, privately built and paid for by the farmers, before the Pine Flat Dam was constructed; nor were any additional works constructed.

** Among other things, the Secretary had to comply with 43 U.S.C. §412, which provides:

> "After December 5, 1924, no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineering features, the cost of construction, land prices, and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States."

The Secretary of the Interior has never performed any of these statutory tasks with respect to the Pine Flat Dam project.

including acreage limitations, comes into play; (b) on the other hand, insofar as the Pine Flat Dam project is concerned, Congress recognized that the ability to regulate the flow of the river by the storage of water behind the Pine Flat Dam could be of considerable benefit to the water users and that, if they availed themselves of the privilege of storing water behind the dam, they had to pay the United States for that privilege.

As to (a) above, Congress achieved that result in §8 of the 1944 Act; as to (b) above, Congress achieved that result as to the Pine Flat Dam in §10 of the 1944 Act in statutory language to which we have previously referred (see pp. 13-14, *supra*).

The preceding paragraph, we think, is the accurate description of the extent to which Congress acceded to the Roosevelt Administration's pleas that the interests of "reclamation" be protected with respect to the flood control projects Congress was authorizing in the 1944 Act.

The Ninth Circuit failed to recognize that this was the extent of the "compromise" the Roosevelt Administration had been able to achieve. But President Roosevelt did recognize that fact: after passage of the 1944 Act, Secretary Ickes submitted a lengthy proposed statement for the President to read on signing the Flood Control Act purporting to confirm that the Kings River project was subject to federal reclamation law and acreage limitations "regardless of whether additional irrigation distribution works are involved" (P. Ex. 135). This claim of victory was not accepted by President Roosevelt; instead he issued a statement containing no reference to §8 or to the Kings River project.

And on April 2, 1945, in signing into law authorization for an appropriation of funds for the Kings River project, the President stated (D. Ex. X12):

> "I have approved reluctantly H. R. 2126, the War Department civil functions appropriation bill, fiscal year 1946.
>
> "Notwithstanding the fact that the bill contains appropriations for certain worth-while purposes, I have been reluctant to sign it because of the fact that it contains also appropriations for work by the Corps of Engineers in connection with projects in the Central Valley area of California, such as the projects in the Kings and Kern Rivers and tributaries.
>
> "On a number of occasions, I have expressed the opinion that these projects, which are predominantly irrigation projects should be constructed and administered under the Federal reclamation laws. The provision of funds now for plans for their construction by the Corps of Engineers may affect adversely existing Federal reclamation work in the Central Valley area and has a tendency, in my judgment, to undermine the established policy which seeks, through Federal reclamation projects, to create farm homes while providing, to the fullest practicable extent, for reimbursement of costs. . . .
>
> "I propose in the near future to submit to the Congress recommendations for legislation transferring jurisdiction over all of these projects in the Central Valley of Calilfornia to the Bureau of Reclamation, Department of the Interior."

Based on the foregoing, we respectfully submit that this Court should review the Ninth Circuit's decision to determine whether it has accurately comprehended the meaning of §8 of the Flood Control Act of 1944 and correctly understood the basic purposes behind Congress' enactment of that provision as part of an omnibus bill authorizing some 90 flood control projects throughout the United States. Clearly, this is an important question of federal law which has not been, but should be settled by this Court.

If for no other reason, this Court should grant review to prevent the economic devastation of an important agricultural community in the United States.

Conclusion

For the foregoing reasons, this Court should grant a writ of certiorari to review the decision below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-5541

TULARE LAKE CANAL COMPANY and TULARE LAKE BASIN WATER STORAGE DISTRICT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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EXHIBIT A

Opinion
United States Court of Appeals
for the Ninth Circuit
Dated April 5, 1976

(Pages 1A to 87A)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* vs. TULARE LAKE CANAL COMPANY, a corporation, *Defendant-Appellee,* TULARE LAKE BASIN WATER STORAGE DISTRICT and SALYER LAND COMPANY, a corporation, *Intervenors-Defendants-Appellees.*	No. 72-2322 OPINION

[April 5, 1976]

Appeal from the United States District Court
for the Eastern District of California

Before: BROWNING, DUNIWAY, and WALLACE, Circuit Judges

BROWNING, Circuit Judge:

This action was brought by the United States to determine two questions regarding the application of the reclamation laws, and particularly section 46 of the Omnibus Adjustment Act of 1926,[1] to private lands receiving irrigation benefits from the Pine Flat Dam, a multiple-purpose dam on the Kings River, which flows into the San Joaquin River Basin in the Central Valley of California.

Section 46 of the 1926 Act bars delivery of reclamation project water to private land in excess of 160 acres in one ownership unless the owner executes a recordable contract with the Secretary of the Interior obligating him to sell the excess land at a price excluding

[1] Act of May 25, 1926, ch. 383, 44 Stat. 636. The pertinent portions of § 46 are set out in full in note 94.

incremental value resulting from the existence of the project. Section 46 also requires the United States to enter into contracts with irrigation districts organized under state law in the area to be served by the reclamation project. In exchange for the government's promise to supply water, the districts undertake to reimburse the United States for an allocated portion of the cost of constructing the project and to withhold water from excess lands within their boundaries for which recordable contracts have not been executed.

The requirement that the owner of private land within a reclamation project agree to dispose of any excess over 160 acres at ex-project prices was intended to serve much the same purposes as the historic restriction on the amount of public land an entryman may obtain from the United States under the homestead acts, the original reclamation act, and other public land laws. As explained in more detail in Part II of this opinion, these purposes are to open private land to settlement by farmers of modest means, to insure wide distribution of the benefits of the federal investment in the reclamation project, and to prevent private landowners from realizing a disproportionate windfall advantage from enhanced productivity and land values because of the project.

Construction of Pine Flat Dam was authorized by the Flood Control Act of 1944,[2] and substantially completed by 1954. Efforts to negotiate repayment contracts pursuant to section 46 for the portion of construction costs allocated to irrigation were unsuccessful. Private owners of excess lands contended that the Flood Control Act of 1944 exempted the Kings River project from the reclamation laws, including section 46. They also contended that even if those laws applied, owners of more than 160 acres of project land could avoid executing a recordable contract for the sale of their excess holdings and receive water for those lands if construction charges were repaid.

Opposition to the acreage limitations came primarily from large landowners in the Tulare Lake Basin, a flat, low-lying region. The Basin contains about 20 percent of the one million acres in the Kings River service area—the area supplied with Kings River water from Pine Flat Dam. It includes the bulk of the service area's more than 280,000 acres of excess holdings. More than

[2]Act of Dec. 22, 1944, ch. 665, 58 Stat. 887.

157,000 of the 188,000 acres within the boundaries of the Tulare Lake Basin Water Storage District, which covers most of the Basin, are held in tracts of more than 160 acres. These excess holdings average 2,600 acres each, including one tract of more than 60,000 acres owned by a single company.

In 1957, Elmer F. Bennett, Solicitor of the Department of the Interior, formally determined that the reclamation laws were applicable to lands served by Pine Flat Dam, rejecting the landowners' argument that the Flood Control Act of 1944 exempted Pine Flat from these laws. 65 I.D. 525 (1957). Attorney General William P. Rogers rendered a formal opinion to the same effect in the following year. 41 Op. A.G. 377 (1958).

By 1957 Interior Department officials had negotiated a repayment contract with the Kings River Conservation District, a service-area-wide entity created to contract with the United States. On the advice of Solicitor Bennett, 64 I.D. 273 (1957), the Secretary of the Interior declined to sign the contract because it would have relieved individual landowners of the section 46 requirement that they execute recordable contracts to dispose of excess lands if they paid all construction costs allocated to their individual holdings.

Negotiations were then resumed between the United States and the various irrigation and water storage districts and canal companies in the Kings River service area. Under contracts proposed in 1961, owners of excess land would have been relieved of the recordable contract requirement if the irrigation district or canal company through which they received project water exercised an option to repay the share of overall construction costs allocated to the landowners served by the district or company. Solicitor Barry concluded that the requirements of section 46 could not be avoided in that manner. 68 I.D. 372 (1961). His opinion on the repayment issue was submitted to the Department of Justice by the Secretary of the Interior and was formally approved by Attorney General Robert F. Kennedy in December 1961. As a result, the proposed contracts were not executed.

The United States and the landowners agreed to submit the disputed issues to the courts. Tulare Lake Canal Company entered into a repayment contract with the United States in which it agreed to withhold delivery of project water from all lands in excess of 160 acres in single ownership unless the owner had

executed a recordable contract for the sale of the excess land. However, the repayment contract provided that the recordable contract requirement would be void if it were determined in the test case that the Kings River project is exempt from section 46, or that section 46 may be avoided by repayment of construction charges. To enable it to test the latter theory, the Canal Company paid its share of the total irrigation cost of the Pine Flat Dam. The other districts and canal companies in the Kings River service area agreed to be bound by the outcome of the test case.

The United States then brought this suit, seeking an injunction prohibiting defendant Tulare Lake Canal Company from delivering "project water"[3] to excess holdings unless the owners executed recordable contracts to sell such excess holdings in accordance with section 46.

The district court denied relief. The district court held that the reclamation laws do not apply to the Kings River project, and that, even if they did, owners of excess land receiving water from the Tulare Lake Canal Company were relieved of the recordable contract requirement of section 46 when the company repaid its share of construction charges allocated to irrigation. *United States v. Tulare Lake Canal Co.*, 340 F. Supp. 1185 (E.D. Cal. 1972). We disagree with the district court on both issues.

We first consider the contention that the Kings River project is wholly exempt from the operation of section 46.

I

Appellees urge this court to hold that in passing the Flood Control Act of 1944 Congress intended to exclude Pine Flat

[3]Substantially all of the water of the Kings River had been appropriated before the Pine Flat Dam was built, and most was being delivered to private lands through an elaborate private irrigation system. Turner v. Kings River Conservation Dist., 360 F.2d 184, 191, 195 (9th Cir. 1966). The irrigation benefits of the Kings River project result from regulation of the flow of the river by storage of water during periods of heavy runoff and release during dry periods. The repayment contracts involved here define "project water"—the water that must be withheld from excess lands not covered by a recordable contract—as only such water as is released at times when it would not have been available but for storage in the Pine Flat reservoir.

Dam from the acreage limitations imposed by the reclamation laws. Such a holding (1) could not be reconciled with the holding in *Turner v. Kings River Conservation District,* 360 F.2d 184 (9th Cir. 1966), which binds this panel; and (2) would be contrary to the intent of Congress underlying the 1944 Act authorizing the construction of Pine Flat Dam.

A.

Turner v. Kings River Conservation District

In *Turner* this court held as follows (360 F.2d at 192):

> Section 8 of the Flood Control Act of 1944[4] authorizes the Secretary of the Interior to operate and maintain structures such as Pine Flat dam "under the provisions of the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388 and Acts amendatory or supplementary thereto)," thus making section 7 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C.A. §421, applicable to the irrigation features of the Pine Flat project.

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[4]Section 8 of the 1944 Act reads as follows:

> Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the cost of the structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirement shall not prejudice lawful uses now existing; *Provided,* That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the Army Engineers, which provides conservation storage of water for irrigation purposes.

58 Stat. 891, 43 U.S.C. § 390.

The strict holding of the court was that section 7 of the 1902 Act, authorizing the Secretary of the Interior to acquire by condemnation rights needed to carry out the reclamation laws, was applicable to the Pine Flat project. As is evident from the passage quoted, however, the premise for this holding was that section 8 of the Flood Control Act of 1944 authorized the Secretary to operate and maintain the Pine Flat project "under the provisions of the Federal Reclamation laws," which include section 7 of the 1902 Act. Since the "Federal Reclamation laws" also include section 46 of the 1926 Act, the premise of *Turner* requires a holding that the recordable contract requirement of section 46 also applies to the Pine Flat project.

Appellees seek to escape this conclusion by arguing that the quoted passage is not a holding but an assumption, made for the purposes of the decision but not essential to it. An examination of the structure of the *Turner* opinion and the proceedings relating to the disposition of the petition for rehearing in that case demonstrates that the court intended to and did hold that the reclamation laws apply to Pine Flat project.

In *Turner*, claimants of rights under state law to use Kings River water on riparian and overlying lands sought to enjoin officials of the Department of the Interior and the Corps of Engineers from operating Pine Flat Dam in such a way as to interfere with these rights. The district court dismissed the action as one against the sovereign without consent. This court concluded that the action could be maintained if the defendant government officers had exceeded their statutory authority. Plaintiffs argued that defendants had exceeded their authority because the 1944 Act, authorizing the construction of Pine Flat Dam, did not authorize the officials to interfere with plaintiffs' water rights. In answer to this argument we held, in the passage quoted, that the officials did have authority to interfere with plaintiffs' water rights in operating Pine Flat Dam because, under section 8 of the 1944 Act, Pine Flat Dam was to be operated pursuant to the reclamation laws, and those laws included the power to take private rights conferred by section 7 of the 1902 Act. We went on to hold that no other provision of the 1944 Act excepted Pine Flat Dam from the grant of eminent domain in section 7 of the 1902 Act.

Appellees contend that this court merely assumed without deciding that section 8 of the 1944 Act applied to Pine Flat Dam. They point out that plaintiffs had alleged that section 8 applied and that certain provisions of reclamation law invoked by that section prohibited defendant officials from interfering with plaintiffs' water rights. Appellees argue that since this court was reviewing the dismissal of a complaint for failure to state a claim, it was required to accept these allegations of the complaint as true; and that it did no more. The obvious answer is that while allegations of fact are to be regarded as true, allegations of law are not. *See* 2A Moore's Federal Practice ¶ 12.08, at 2267-69. Whether section 8 of the 1944 Act made the reclamation laws applicable to Pine Flat project was a question of law. The resolution of this question of law was essential to the decision of the case. If the defendant officers were not authorized to take plaintiffs' water rights, they were acting unlawfully and the suit to enjoin their unlawful conduct was not barred as a suit against the United States. This court found the necessary authority to condemn in section 7 of the 1902 Act, and the availability of section 7 of the 1902 Act required the holding that section 8 of the 1944 Act made the reclamation laws applicable to Pine Flat Dam.

Moreover, the *Turner* court was specifically asked to modify its opinion to state that the applicability of the reclamation laws was not decided but only assumed, as appellees in this case now argue. The court refused to do so.

As the opinion in *Turner* was originally filed, the passage quoted above stated that section 8 of the 1944 Act made "all of the provisions and limitations of the Reclamation law applicable to the irrigation features of the Pine Flat project." Slip opinion at 10. The Kings River Conservation District, among others, filed a "Petition for Rehearing or, in the Alternative, for Modification or Clarification of the Court's Opinion." The petition requested the court to modify the passage quoted to indicate that the court was only assuming and not deciding that section 8 of the 1944 Act made reclamation law applicable to Pine Flat. The revision suggested by petitioners was as follows (Petition 10-11):

> If we assume that Section 8 of the Flood Control Act of 1944 authorizes the Secretary of the Interior to operate and maintain structures such as Pine Flat Dam "under the provi-

sions of the Federal Reclamation laws (Act of June 17, 1902, 32 Stat. 388 and Acts amendatory or supplementary thereto)," and thus makes all of the provisions and limitations of the Reclamation law applicable to the irrigation features of the Pine Flat project, the appellee officials would nevertheless be authorized to interfere with appellants' rights in the manner alleged in the complaint.

The court did not adopt the suggested language. The revision the court did adopt, quoted earlier, necessarily involved rejection of the suggestion that the court restate, as an assumption rather than as a holding, the court's premise that section 8 of the 1944 Act made the reclamation laws applicable to Pine Flat.

The court did, however, narrow its conclusion to the precise necessities of the case by substituting "section 7 of the Reclamation Act of 1902" for the broader phrase, "all of the provisions and limitations of the Reclamation law." The reason is clear. It is apparent that the *Turner* court had concluded that section 8 of the 1944 Act made all the provisions and limitations of the reclamation laws applicable to Pine Flat, for the opinion initially stated as much and the authorities cited were to that effect.[5] The petition for modification of the *Turner* opinion also appeared to concede that if section 8 made the reclamation laws applicable to Pine Flat at all, it made those laws applicable in their entirety, including acreage limitations.[6] However, the petition, in a foot-

[5]All of the authorities cited in this portion of the *Turner* opinion, both as initially filed and as modified, dealt with whether the reclamation laws as such are applicable to the Pine Flat Dam. Indeed, they discuss acreage limitations, but do not discuss the power to condemn. The citations were: 41 Op. A.G. 377; Inter-University Case Program Committee on Public Administration Cases, The Kings River Project in the Basin of the Great Central Valley 44-47 (1949); A. Maass, *Administering the CVP*, 38 Calif. L. Rev. 666, 688 (1950); P. Taylor, *Excess Land Law on the Kern?*, 46 Calif. L. Rev. 153, 166-70 (1958); *see also* L. Graham, *The Central Valley Project: Resource Development of a Natural Basin*, 38 Calif. L. Rev. 588, 629-30 (1950).

[6]*See* Petition for Modification at 5, 7. The petition for modification was supported in amici curiae briefs submitted by irrigation districts on the nearby Kern and Kaweah River projects. The Kaweah Delta Water Conservation District appeared to concede that if reclamation law was applicable to the irrigation features of the Pine Flat Dam, it was applicable in its entirety, Brief at 7, and the other amici did not argue to the contrary.

note, did reserve the argument that even if reclamation laws were generally applicable to Pine Flat, the provisions regarding acreage limitation were not;[7] and argued that this narrow issue should not be definitely resolved until the court had the benefit of a fuller presentation that would be available in the present litigation, then only recently filed. It is apparent that the purpose of the modifications of the *Turner* opinion limiting the specific reference to section 7 of the 1902 Act was solely to preserve the opportunity for appellees in this case to make the promised demonstration that although section 8 applies to the Pine Flat Dam, the acreage limitation provisions of the reclamation laws do not. Appellees have not attempted to make this showing. Instead they have argued that the reclamation laws are entirely inapplicable to this project. This position was rejected in *Turner*.[8]

Nonetheless, in view of the importance of the question, and the opportunity this case has given to examine it more fully, we have reconsidered the legislative history of the Flood Control Act of 1944 at some length. That re-examination reveals that section 8 was conceived and considered by Congress with the Pine Flat Dam and other nearby projects in the Sacramento-San Joaquin River Basin specifically in mind, and that the application of the excess land provisions to these projects was the principal issue in controversy. The legislative history leaves no doubt that the 160-acre limitation was intended to apply in the Kings River service area.

B.

Legislative History of Flood Control Act of 1944

In *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958), the Supreme Court declined to imply an exception to the

[7]"There is certainly room for argument that even if Section 8 applies to the Pine Flat Dam, the acreage limitation provisions of Reclamation law do not apply, either as a matter of statutory construction or constitutional authority." Petition for Modification at 7 n.6.

[8]Finally, appellees rely on the holding in *Turner* that plaintiffs in that case had no standing to raise the specific issue of whether acreage limitations as such applied to the Kings River project. 360 F.2d at 198. The point, however, is that plaintiffs in *Turner* could contend, and this court could and did decide, that § 8 of the 1944 Act made the reclamation laws applicable to the Kings River project. The present case must be decided on that legal premise.

acreage limitation provision found in section 5 of the 1902 Act, substantially re-enacted in section 46 of the 1926 Act, stating, "Significantly, where a particular project has been exempted because of its peculiar circumstances, the Congress has always made such exemption by express enactment." 357 U.S. at 292.[9] There is no "exemption by express enactment" of the Kings River project from acreage limitations in the 1944 Act or any other statute. The argument for exemption rests instead upon indirect implications drawn from the text of the 1944 Act and scattered incidents in the legislative history. In light of *Ivanhoe* and the important public interests underlying the historical policy of acreage limitations in reclamation law, it is questionable whether it would be appropriate to base exemption upon such a foundation. In any event, the legislative history of the 1944 Act demonstrates that an implied exemption would be wholly unjustified.

It may be helpful to begin with a brief summary of the legislative history of the 1944 Act as it relates to the Kings River project.

Mention should be made at the outset of a significant factor in the historical context in which Congress considered the 1944 Act. A proposal to expressly exempt the Central Valley project from acreage limitations was under consideration by Congress at the time that Congress was considering the 1944 Act. The proposal for express exemption was defeated after vigorous congressional debate. *See Ivanhoe Irrigation District v. McCracken, supra,* 357 U.S. at 292-93.

An almost identical debate took place during consideration of the Flood Control Act regarding whether the reclamation laws, and especially acreage limitations, should be applicable to the Pine Flat Dam and other projects authorized for construction in the Sacramento-San Joaquin River Basin. These projects were to be adjacent to the Central Valley project; the Administration argued they should be integrated into it. Under these circumstances, it is highly unlikely that the same Congress that rejected an express exemption for the Central Valley project intended, *sub*

[9]Projects expressly exempted from the acreage limitations and an explanation of the reasons thought to justify the exemptions are listed in Acreage Limitation Policy, Study Prepared by the Department of the Interior for the Senate Committee on Interior and Insular Affairs, 88th Cong., 2d Sess. 25-30, 51-77, 79 (Comm. Print 1964).

silentio, to exclude the Pine Flat Dam from acreage limitations. The legislative history confirms that it did not.

The proceedings directly concerned with the 1944 Act were marked by a continuing controversy over two distinct issues: (1) whether Pine Flat Dam should be constructed by the Corps of Engineers or the Bureau of Reclamation; and (2) whether the acreage limitation should apply to the project once built. The controversy may fairly be characterized as a power struggle between Kings River water users and the Roosevelt Administration. The water users needed the dam for flood protection and a regulated water flow. They were willing to pay for irrigation benefits, but did not wish to become subject to the reclamation laws, especially acreage restrictions. The Administration, represented by President Roosevelt, Secretary of the Interior Ickes, and Commissioner Bashore of the Bureau of Reclamation, was equally insistent that the acreage restrictions should apply to the Kings River project. The Administration was not willing to accept reimbursement of the costs attributable to irrigation benefits as a substitute for those limitations. In the Administration's view, the interests of the United States were not merely financial. They included such social purposes as wide dispersion of the public subsidy, avoidance of speculation, and provision of family homes and farms, especially for soldiers who would soon be returning from the war.

Both sides of the controversy were exhaustively presented before congressional committees and on the floor of the House and the Senate. Neither side emerged wholly victorious. The California interests prevailed on the issue of which agency should construct Pine Flat Dam—Congress decided that Pine Flat Dam should be built by the Corps of Engineers. They lost on the issue of whether acreage limitations should apply—Congress decided that these limitations should apply to the Kings River project. The California interests emerged from the House with no more than a colorable argument on the latter issue, based upon equivocal statements in committee hearings and floor debate; but the proceedings in the Senate, particularly in the consideration of the conference report, make it clear beyond question that the struggle against acreage limitations was ultimately lost. What is now section 8 of the 1944 Act was redrafted in the Senate to conform to the wishes of the Secretary of the Interior, who was

adamant in his insistence that the reclamation laws should apply to the Kings River project. The Senate rejected an amendment specifically designed to exempt dams in the Sacramento-San Joaquin River Basin, especially those on the Kings and Kern Rivers, from the operation of section 8. A colloquy between Senator Overton, floor manager of the bill, and Senator Hill, Acting Majority Leader, at the close of debate on the conference report, was intended to and did remove any doubt that section 8 was applicable to the California projects.

Soon after the President signed the Flood Control Bill, California interests attempted to regain their position by securing an administrative determination that the Secretary of War was authorized to negotiate with water users for repayment without regard to reclamation law. Again they lost. The contemporaneous interpretation of the 1944 Act by the President, the Secretary of War, and the Secretary of the Interior was that irrigation uses of the Pine Flat Dam were subject to reclamation law. This has been the consistent interpretation of the 1944 Act by the Department of the Interior since 1944. It was confirmed in 1958 by a formal opinion of the Attorney General. 41 Op. A.G. 377 (1958).

We turn to a more detailed consideration of the legislation and administrative background of the 1944 Act.

In 1940 both the Corps of Engineers and the Bureau of Reclamation submitted reports to Congress recommending construction of a dam on the Kings River. Specifications for the dam were similar. Both proposals predicted that the flood control and irrigation benefits would be about equal.[10] The proposals differed, however, as to who should build the dam and operate it. The Corps of Engineers proposed that the Corps build the dam and that local interests operate it under regulations prescribed by the Secretary of War. The Bureau of Reclamation proposed that the dam be built and operated by the Bureau.[11] The recommended schedule for payment of allocable irrigation construction costs by water users also differed. The Bureau recommended annual in-

[10]H.R. Doc. No. 630, 76th Cong., 3d Sess. 4 (1940) (Corps of Engineers); H.R. Doc. No. 631, 76th Cong., 3d Sess. 29 (1940) (Bureau of Reclamation).

[11]H.R. Doc. No. 630 at 5; H.R. Doc. No. 631 at V.

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stallments to be paid over 40 years (the usual repayment period under reclamation law). The Corps recommended payment of a lump sum representing the discounted present value of the 40 annual installments.[12]

President Roosevelt concluded that the project was "dominantly an irrigation undertaking and is suited to operation and maintenance under the reclamation law." He endorsed the Interior Department's proposals that the Bureau of Reclamation construct, operate, and maintain the Kings River project and that repayment be made in 40 annual installments under prevailing reclamation policy.[13]

Hearings on the proposals were held before the House Flood Control Committee in 1940 and 1941. Local water users opposed the Bureau's proposal and endorsed that of the Corps of Engineers. The Kings River-Pine Flat Association was especially concerned that Bureau control over release of water might result in interference with their vested water rights.[14] Acreage limitations were not discussed.

Out of deference to the President's position that the Kings River project should be built by the Bureau, this project was not in-

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[12]H.R. Doc. No. 630 at 4-5; H.R. Doc. No. 631 at IV-V.

[13]Letter from Franklin D. Roosevelt to the Secretary of the Interior, May 29, 1940, H.R. Doc. No. 631 (Part II) at 5. The President conveyed his position to the Chairman of the House Flood Control Committee considering the Kings River proposals. He also suggested:

> A good rule for the Congress to apply in considering these water projects, in my opinion, would be that the dominant interest should determine which agency should build and which should operate the project. Projects in which flood control or navigation clearly dominate are those in which the interest of the Corps of Engineers is superior and projects in which irrigation and related conservation uses dominate fall into the legitimate field of the Bureau of Reclamation.

Letter from Franklin D. Roosevelt to William M. Whittington, May 5, 1941, Hearings on H.R. 4485 before the House Flood Control Committee (Part II), 78th Cong., 2d Sess. 616, 617 (1944).

[14]Kings River-Pine Flat Ass'n, Outline of Verbal Report of Engineering Board of Review Made to Directors of the Ass'n, Mar. 9, 1940, at 9-10. For the reason stated in the text, and because the Association opposed the Bureau's plans for public development of hydroelectric power in conjunction with the dam, the Association voted to endorse the proposal of the Corps of Engineers. Resolution of Kings River-Pine Flat

cluded in the comprehensive flood control bill reported by the House Flood Control Committee in 1941. The committee issued a separate report recommending construction of the dam by the Corps of Engineers,[15] but no further action was taken.

Hearings before the House Flood Control Committee resumed in 1943 and continued in 1944. In 1944 President Roosevelt wrote to Congressman Whittington, chairman of the committee, modifying the Administration's earlier position. The President reaffirmed his view that the Kings River and Kern River projects were predominantly for irrigation and should therefore be built and operated by the Bureau of Reclamation—a view that had been rejected by the committee in its 1941 report. However, the President added a new suggestion, namely, that Congress provide for multiple-agency administration of multiple-purpose projects. The President proposed that whatever agency constructed a multiple-purpose project, each agency having an interest in the project should be given responsibility for administering its interest in accordance with its own legislation and policies. "For example," the President wrote, "the Bureau of Reclamation in the Department of the Interior should administer, under the Reclamation laws and its general policies, those irrigation benefits and phases of projects built by the Corps of Engineers."[16]

Ass'n, Mar. 9, 1940; Hearings on H.R. 9640 before the House Flood Control Committee, 76th Cong., 3d Sess. 522-54 (1940). Indeed, water users represented by the Association later took the position that they would prefer to have no dam at all rather than one built by the Bureau. Hearings on H.R. 4911 before the House Flood Control Committee, 77th Cong., 1st Sess. 181 (1941).

[15] H.R. Rep. No. 1174, 77th Cong., 1st Sess. (1941).

[16] Letter from Franklin D. Roosevelt to William M. Whittington, Feb. 7, 1944, 1944 House Hearings, *supra* note 13, at 615, 616. The pertinent paragraph reads in full as follows:

> In my letter of May 5, 1941, I suggested that a sound policy in connection with these water projects would consist of selecting the construction agency by determining the dominant interest. Projects in which navigation or flood control clearly dominate are those in which the interest of the Corps of Engineers is superior and should be so recognized. On the other hand, projects in which irrigation and related conservation dominate are those in which the interest of the Bureau of Reclamation in the Department of the Interior is paramount and should be so recognized. No matter which agency builds a multiple-purpose structure involving in even a minor way the

It is important to note that this suggestion was directed specifically to Pine Flat Dam on the Kings River and to the adjacent Kern River project.[17] It provided the basis for the compromise eventually reflected in section 8 of the 1944 Act.

Thus, the Administration sought to have the reclamation laws, and especially the excess land provisions, applied to the Kings River and Kern River projects in two ways: by having these projects built and operated by the Bureau of Reclamation or, failing that, by having use of these projects for irrigation administered by the Bureau under the reclamation laws. The Administration failed in its efforts to have Pine Flat Dam constructed by the Bureau; Congress ultimately concluded that the dam should be built by the Corps of Engineers. But it succeeded in its alternative position, securing in section 8 a provision that the irrigation uses of projects constructed by the Corps of Engineers should conform with reclamation law.

Commissioner Bashore presented the Administration's position to the House Flood Control Committee in detailed testimony supplementing the President's letter. Commissioner Bashore's presentation was directed specifically to the Kings River and Kern River projects.[18] He repeated the Administration's position that both projects should be built by the Bureau. He went on to urge, however, that if Congress should decide to authorize construction by the Corps of Engineers, the statute authorizing construction should provide that irrigation benefits of the two projects be ad-

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interests of the other, the agency with the responsibility for that particular interest should administer it in accordance with its authorizing legislation and general policies. For example, the Bureau of Reclamation in the Department of the Interior should administer, under the Reclamation laws and its general policies, those irrigation benefits and phases of projects built by the Corps of Engineers. These suggestions are, to my mind, even more pertinent today. For today we gird for peace. Confusion over jurisdiction ought not to be allowed to disrupt the great preparations now being made for post-war construction of vital public works.

[17]The President's letter referred to these two projects by name, and no others. As noted later in the text, Commissioner Bashore specifically suggested language to implement the President's proposal during his testimony before the House Flood Control Committee regarding the Kings River and Kern River projects.

[18]1944 House Hearings, *supra* note 13, at 627 *et seq.*

ministered by the Secretary of the Interior under the reclamation laws.[19] The statutory language suggested by Commissioner Bashore appears in the margin.[20]

Commissioner Bashore made it explicitly clear that the purpose of the provision was to make the acreage limitations applicable to

[19]The suggestion was initially stated in terms of the Kern River project alone, *id.* at 638, but only because it was the Bureau's position that the Bureau had already been authorized to construct the Kings River project. *Id.* at 628. There is no basis for distinguishing the two projects. Discussion of the Kings River and Kern River projects, and only those two, was intertwined throughout Commissioner Bashore's appearance before the committee. *Id.* at 623-53, 671-88. Commissioner Bashore made it clear that the suggestion applied to *any* project constructed by the Corps of Engineers that had irrigation as one of its purposes, *id.* at 638, 640, 641, 645, 646, 682-83, 683-84, and in later testimony he applied the suggestion specifically to the Kings River project. *Id.* at 645, 681-84. The relevant characteristics of the two projects are similar, and appellees concede that the same rule must govern both.

[20]In the case of any reclamation project coming within the scope of the definition of the term "project" in the Reclamation Project Act of 1939 or any project authorized under the act of August 11, 1939 (53 Stat. 1418), as amended in connection with which there have been nonreimbursable allocations to flood control or navigation purposes made by the Secretary of the Interior after consultation with the Secretary of War, it shall be the duty of the Secretary of War, after consultation with the Secretary of the Interior, to prescribe regulations consistent with such allocations with respect to the operation for these purposes; and the operation of any such project shall be in accordance with such regulations. In connection with dams or other works herein or hereafter authorized for construction, and constructed under the direction of the Secretary of War and supervision of the Chief of Engineers and which the Secretary of the Interior determines, with the concurrence of the Secretary of War, may be utilized in part for irrigation, power, municipal water supply or other miscellaneous purposes, the operation of said dam or other works for such purposes shall be in accordance with regulations prescribed by the Secretary of the Interior pursuant to the Federal reclamation laws, act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto; and in connection with said dams or other works the Secretary of the Interior is authorized to construct, operate, and maintain under the provisions of the said Federal reclamation laws such additional works as he may deem necessary for irrigation, power, municipal water supply, or other miscellaneous purposes. Such additional works may be undertaken only if authorized under said Federal reclamation laws; and within the limits of feasibility

the Kings River and Kern River projects.[21] He emphasized the social purposes intended to be accomplished by breaking up the large landholdings in the areas that would be served by these projects—spreading the federal subsidy, preventing speculation, and making it possible for people of limited means to establish farms on irrigated lands on which families could be self-sustaining.[22] He expressly rejected the notion that repayment by water users of the costs of construction allocated to irrigation would be an acceptable substitute for the advancement of these social purposes.[23]

All of the objections now raised to application of acreage limitations to the Kings River project were also fully presented to the committee—that all land to be served was in private hands, that local water users had appropriated most if not all Kings River water and had constructed extensive irrigation works in the area, and that no new lands would be brought under irrigation as a result of the project.[24] In order to gain the benefits of federally subsidized flood control and irrigation without subjecting themselves to acreage limitations, the landowners urged the committee to adopt the dominant-interest test originally advocated by the

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under said Federal reclamation laws, there may be allocated to irrigation, power, municipal or other miscellaneous purposes, appropriate returnable shares of the cost of multiple-purpose features serving said purposes.

Id. at 639.

[21] *Id.* at 681-84.

[22] *Id.* at 642-44, 672, 677-82, 685.

[23] Mr. BASHORE. I think you are judging the dominance of the interest by the amount of money allocated to flood control and the amount of money that is expected to be directly reimbursable. I do not think you can properly judge it from that standpoint. The Government did not go into the business of reclamation with the view of making any money out of it. It provided very liberal terms; no interest. But the Government expected that money to be returned; and it expected more than that—it expected that the country would be developed. That is what we are concerned with. The point I am trying to make is that it goes far beyond the reimbursable and nonreimbursable features of the project to determine whether it is dominantly this or dominantly that.

Id. at 679-80.

[24] *Id.* at 741-44, 766-68. *See also id.* at 642-43, 645, 672, 675, 677-78.

Administration,[25] to recognize that the dominant purpose of the Kings River project was flood control, and to provide that it be constructed by the Corps of Engineers and be operated either by the Corps or, preferably, by the water users themselves.[26]

The bill reported by the House committee authorized construction of the Pine Flat Dam by the Corps of Engineers,[27] but it also embodied the President's proposal for joint administration of multiple-purpose projects. Section 5 of the bill provided that the projects should be operated for navigation and flood control purposes in accordance with regulations prescribed by the Secretary of War. Section 6 provided that projects built by the Corps of Engineers should be utilized for reclamation purposes in accordance with regulations prescribed by the Secretary of the Interior.[28]

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[25] *See* note 13.

[26] 1944 House Hearings, *supra* note 13, at 742-43, 766-68.

[27] 90 Cong. Rec. 4206 (1944). The language of the committee bill was identical to that contained in § 10 of the Act as finally passed. Section 10 reads:

> The project for flood control and other purposes for the Kings River and Tulare Lake Basin, California, is hereby authorized substantially in accordance with the plans contained in House Document Numbered 630, Seventy-Sixth Congress, third session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable at an estimated cost of $19,700,000: *Provided,* That the conditions of local cooperation specified in said document shall not apply: *Provided further,* That the Secretary of War shall make arrangements for payment to the United States by the State of other responsible agency, either in lump sum or annual installments, for conservation storage when used: *Provided further,* That the division of costs between flood control, and irrigation and other water uses shall be determined by the Secretary of War on the basis of continuing studies by the Bureau of Reclamation, the War Department, and the local organizations.

58 Stat. 901.

[28] The subject matter of Commissioner Bashore's proposal, *supra* note 20, was divided between §§ 5 and 6 of the House committee bill. Section 6 read:

> Hereafter, whenever in the opinion of the Secretary of War and the Chief of Engineers any dam and reservoir project operated under the direction of the Secretary of War can be consistently used for reclamation of arid lands, it shall be the duty of the Secretary of the Interior to prescribe regulations for the use of the storage

With minor modifications, the language of section 6 followed that proposed to the committee by Commissioner Bashore for the avowed purpose of making acreage limitation provisions of reclamation law applicable to the irrigation features of the Kings River and Kern River projects in the event the committee should decide, as it did, that the construction of these dams should be assigned to the Corps of Engineers.[29]

In the course of debate on the floor of the House, Congressman Curtis, a member of the committee, explained section 6 in essentially these terms.[30] Committee Chairman Whittington also described section 6 as a broad grant of power to the Secretary of the Interior to regulate reclamation features of the authorized projects.[31] Each characterized the section as a concession to the Bureau of Reclamation and the Secretary of the Interior.

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available for such purpose, and the operation of any such project shall be in accordance with such regulations. Such rates, as the Secretary of the Interior may deem reasonable, shall be charged for the use of said stored water; the moneys received to be deposited into the Treasury to the credit of miscellaneous receipts.

90 Cong. Rec. 4204 (1944). *See also* H.R. Rep. No. 1309, 78th Cong., 2d Sess. 8 (1944).

[29]*See* note 20.

[30]Representative Curtis stated:

[T]his bill provides that whenever any reservoir is being operated by the War Department, it is found that there is available water for irrigating farm lands, that the Bureau of Reclamation, through the Secretary of the Interior, shall prescribe the rules and regulations for the operation of that part of the storage that is available for irrigation. In other words, it gives the Bureau of Reclamation jurisdiction over the irrigation features of the reservoirs and the distribution systems. I think that is sound and advisable. I am told by individuals in the Bureau of Reclamation that it is a definite gain for them and a step forward.

90 Cong. Rec. 4130.

[I]n any reservoir where there is storage space available for irrigating farm lands . . . the regulation of that shall be turned over to the Bureau of Reclamation, which is a concession on the part of the Army.

Id. at 4134.

[31]Describing §§ 5 and 6, Chairman Whittington said:

Section 5 gives supervision of operation for flood control and navigation to the Chief of Engineers.

Section 6 speaks for itself in an effort to lean over backward, and gives to the Secretary of the Interior power of handling reclamation

The Administration was still not entirely satisfied. Section 6 of the committee bill provided that water available for reclamation was to be distributed in accordance with regulations prescribed by the Secretary of the Interior, but it did not specifically state that such regulations should conform to reclamation law, as had Commissioner Bashore's proposal.[32] On April 10, 1944, Secretary Ickes wrote the Director of the Bureau of the Budget expressing concern that the committee bill did not make reclamation law applicable to irrigation uses of water stored behind the dams authorized in the bill. He made it clear that his objection was motivated by a fear that the bill might permit large landowners on the Kings River and Kern River projects to avoid the acreage limitations.[33] During the floor debates on May 9, 1944, Chairman Whittington offered a "perfecting amendment" on behalf of the Flood Control Committee, adding to section 6 the express requirement that the Secretary of the Interior regulate the use of irrigation waters "under existing reclamation law." He stated that the amendment was proposed because "some of the friends and spokesmen for reclamation were critical of the language in the bill."[34] The amendment was adopted. On May 20 the Acting Director of the Bureau of the Budget replied to Secretary Ickes' letter of April 10, calling attention to this amendment to section 6 and stating, "[T]his change would give the Department of the Interior all the authority necessary."[35]

As the bill left the House, therefore, the overwhelming evidence was that it represented a victory for the Administration's position that the irrigation uses of the Kings River project and other projects authorized by the bill were to conform to the reclamation laws, and specifically to acreage limitations, even though the projects were to be built by the Corps of Engineers.

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and the disposal of reclamation waters provided by the projects authorized in this bill.

90 Cong. Rec. 4126. *See also* 90 Cong. Rec. 4123.

[32] *See* note 20.

[33] Letter from Harold L. Ickes to Harold D. Smith, Apr. 10, 1944.

[34] 90 Cong. Rec. 4204.

[35] Letter from Paul H. Appleby to the Secretary of the Interior, May 20, 1944, Hearings on H.R. 4485 before a Subcommittee of the Senate Commerce Committee, 78th Cong., 2d Sess. 13, 14 (1944).

All that can be garnered to lend possible support to appellees' contrary interpretation is language in the committee report and in Chairman Whittington's remarks on the floor that really consists of nothing more than a sympathetic recitation of arguments advanced by water users against application of the reclamation laws to the Pine Flat project.[36]

Subsequent proceedings in the Senate removed any possible doubt as to Congress' intention to apply acreage limitations to the Kings River project.

Hearings before a subcommittee of the Senate Commerce Committee produced the same general conflict of views that had developed in hearings before the House Flood Control Committee. Again California interests were arrayed against the Administration, which was supported by organizations of labor and small

[36]Thus, the committee report states:

> The committee has heard extensive testimony from local interests and has questioned the Chief of Engineers and the Commissioner of Reclamation at length in hearings in 1941, 1943, and 1944. Local interests have all impressed the committee with the seriousness of the flood hazard and their desire that the proposed works be constructed as soon as possible. They are practically unanimous in their statements that the dominant interest in the project is flood control with irrigation of secondary consideration. Such irrigation benefits as would result would accrue to land now already developed without bringing into production additional arid land. Local interests are so strongly in opposition to a project built under reclamation law that they have stated that rather than have the project built by the Bureau of Reclamation they prefer no Federal project at all.

But the report continued:

> After very careful consideration of the reports, the communications of the President which are printed in the hearings, and the testimony and written statements in the hearings, the committee is convinced that the project should be authorized by Congress as a flood-control project *with adequate safeguards for the interests of the Bureau of Reclamation*. The committee believes that these safeguards are fully covered in the language contained in the bill. The committee therefore recommends authorization of the project as proposed in the bill at an estimated cost of $19,700,000.

H.R. Rep. No. 1309, 78th Cong., 2d Sess. 43 (1944) (emphasis added). The "adequate safeguards" mentioned by the committee can only have referred to the provisions of § 6.

Chairman Whittington's remarks, similar to those in the first paragraph quoted from the committee report, are found at 90 Cong. Rec. 4123-24, 4209.

farmers. Again the controversy centered upon the application of acreage limitations, particularly to projects in the Sacramento-San Joaquin River Basin, including Pine Flat Dam. Again proponents of acreage limitation pressed the historical purposes served by such provisions—spreading the federal subsidy, avoiding speculation, creating family farms—while opponents again pressed the features of the Kings River and Kern River projects that assertedly made application of acreage limitations inappropriate.[37]

Administration spokesmen again sought to have these projects built by the Bureau, rather than the Corps of Engineers, and expressed their disappointment in the House decision to the contrary;[38] but they also reaffirmed the President's alternative suggestion that water made available for irrigation by projects built by the Corps of Engineers be utilized in accordance with the reclamation laws, including acreage limitations.[39]

The issue was never in doubt. The subcommittee was obviously impressed with the experience and skill of the Corps of Engineers in building and operating dams for effective flood control.[40] On the other hand, this same subcommittee had recently demonstrated its adherence to enforcement of acreage limitations in federally subsidized irrigation projects by rejecting the proposal that the Central Valley project be exempted from such limitations.[41] Moreover, on the earlier occasion this same subcommittee had advanced as a solution to the apparent dilemma the very approach that was reflected in section 6 of the House bill—that is, that the Corps of Engineers be authorized to construct these multiple-purpose projects, but that irrigation features of such projects be utilized in conformity with the reclamation laws.[42] It was

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[37] *See generally* 1944 Senate Hearings, *supra* note 35, at 213-65, 278-86, 298-320, 363, 152-65, 527-33, 634-37.

[38] In a change of strategy, the Bureau stressed the need to integrate construction and operation of the Kings River and Kern River projects with the massive Central Valley project, rather than relying principally on the argument that irrigation benefits of the projects standing alone outweighed their flood control purposes. *Id.* at 213-14, 217-18, 220, 222-23, 252, 255-58, 459-60.

[39] *Id.* at 457-61, 527-33.

[40] *Id.* at 242, 260-61.

[41] S. Rep. No. 903, 78th Cong., 2d Sess. 4 (1944).

[42] 1944 Senate Hearings, *supra* note 35, at 222, 261-62, 458, 561-62.

inevitable that members of the subcommittee would suggest that the same approach be adopted in connection with Pine Flat and other nearby projects.[43]

Both Secretary Ickes and Commissioner Bashore appeared before the subcommittee. Both made it clear that at the heart of the conflict were the efforts of owners of large tracts of land in California projects, including the Kings River project, to escape the acreage limitation and antispeculation provisions of the reclamation laws. Both urged the subcommittee to reject these efforts.[44] Both accepted section 6 of the House bill as intended to make the reclamation laws, including acreage limitations, applicable to irrigation uses of projects authorized by the Act, but both suggested

[43] *Id.* at 221-22, 239-43, 260-63.

[44] Secretary Ickes testified:

> In considering what this flood-control bill would actually do for the Central Valley of California, as in the case of the river and harbor bill before it, you will need no supersleuth to discover that there are strong local interests from that area which seek to avoid application of the Federal reclamation laws to themselves. In the river and harbor bill the attempt was to secure the direct repeal of certain provisions obnoxious to these interests. In the present bill the attempt is to circumvent the application of these provisions by having the works built by an agency other than the Bureau of Reclamation.
>
> Naturally large landed interests have been conspicuous in this slightly disguised effort to escape the provisions of the Federal reclamation laws which seek to distribute widely the benefits of conserved water. Other local interests at the same time, among whom family-size farmers are conspicuous, have been equally insistent that the antimonopoly and antispeculation features of the Federal reclamation laws shall be maintained without alteration in principle. If my opinion is worth anything, the national interest clearly lies on the side of the family-size farm families.
>
> It is very pleasant news to learn that your committee had struck from the river and harbor bill the section which purported to make inapplicable to the Central Valley project the excess-land provisions of the Federal reclamation laws. Certainly the amendment that sought to do this, regardless of whatever merit it might have, had no place as an eleventh-hour-and-fifty-ninth-second hitch-higher [sic] to the river and harbor bill. As corroborating the wisdom of your action, I would like to call your attention to the fact that the Senate Committee on Appropriations has recently been called upon to consider an identical issue, and has decided it in a similar manner. In reporting to the Senate an appropriation for preliminary work on the Kings River project by the Bureau of Reclamation, the committee squarely stated that "the Kings River project should be constructed

modification of the language to accomplish this purpose more effectively.[45]

During the hearings Secretary Ickes had written to the chairman of the Senate Commerce Committee:

> I regard section 6 of the bill as intended to provide for the application of the Federal reclamation laws to projects having irrigation possibilities. . . . However, the provisions of this section are not entirely apt in their relation to the various technical features of the Federal reclamation laws.[46]

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as now authorized under the reclamation law." I urge you to adopt and apply this same principle in connection with all multiple-purpose reservoirs in the Sacramento and San Joaquin Basins.

Id. at 460-61.

In earlier testimony Commissioner Bashore had called the subcommittee's attention to the details of the action by the Senate Committee on Appropriations, quoting at length from a committee report. The report stated that the proposed transfer of responsibility for construction of the Kings River project from the Reclamation Service to the Corps of Engineers would permit Kings River landowners to escape the provisions of § 46 of the 1926 Act. The report quoted § 46 and relevant portions of the Fact Finders' report on which it was based, and concluded:

> Under existing law, as above quoted, reclamation project water is available to any landowner regardless of the size of his holdings provided that he agrees to sell any irrigable land in excess of 160 acres when and if an opportunity occurs at a price not in excess of its fair appraisal value. This law has been in effect for 18 years on more than 60 reclamation projects and there is excellent proof that it operates in a reasonable and equitable manner and is achieving the purpose for which it was intended. It does not require sudden or precipitate breaking up of real-estate holdings but, in an orderly and gradual way, it prevents land monopoly and speculation in benefits created by the expenditure of Federal funds. Most of all, it assures that there will be opportunities for men to secure farms and make homes and livelihood for themselves and their families without incurring a ruinous debt because of the wild gambling of land speculators.
>
> Under these circumstances the committee is of the opinion that the Kings River project should be constructed as now authorized under the reclamation law.

S. Rep. No. 899, 78th Cong., 2d Sess. 4 (1944), *quoted in* 1944 Senate Hearings at 215.

[45] 1944 Senate Hearings, *supra* note 35, at 458, 532-33.

[46] Letter from Harold L. Ickes to Josiah W. Bailey, June 2, 1944, *id.* at 310, 313.

Secretary Ickes amplified these views in his testimony before the Senate committee:

> [Section 6] as it now stands provides for the application of the Federal reclamation laws to the irrigation features of Army reservoir projects. However, it is not drafted in a way that ties in with the basic provisions of the reclamation laws in all pertinent respects. *For example, it speaks of those laws as though they involved merely the imposition of regulations, whereas in truth they are largely designed to authorize a system of contractual relationships.* It disregards the problem of allocating costs for multiple-purpose facilities serving other uses in addition to irrigation. And it overlooks the special laws relating to Indian irrigation developments. Hence, I believe that this section should be rephrased in a way that would eliminate possible future uncertainties with respect to its precise meaning and operation.[47]

The Secretary's first concern, one particularly relevant here, is understandable. The mechanism adopted by section 46 of the 1926 Act for accomplishing the antimonopoly and antispeculation objectives of acreage limitations was to direct the Secretary of the Interior to include in repayment contracts with irrigation districts provisions under which the districts were required to withhold water from owners of excess lands who had not executed recordable contracts agreeing to sell that excess land at ex-project prices. This enforcement mechanism, based upon contractual relationships, replaced the prior method of enforcement through regulations governing water right applications.[48] The regulatory scheme therefore did not apply to projects built after the passage of the 1926 Act. Yet section 6 of the House bill was couched entirely in terms of the Secretary's power to prescribe regulations, rather than the Secretary's power to enter into contracts. Though technical, the deficiency was obviously significant. The revision proposed by the Secretary met the problem by broadening the language of section 6 to provide that dams were to be utilized for irrigation purposes "only in conformity with the provisions of this section," that is, "under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat.

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[47] *Id.* at 458 (emphasis added).

[48] *See* pages 44, 57-59 & n. 133.

388, and acts amendatory thereof or supplementary thereto)"—which of course included the 1926 Act.[49]

The subcommittee adopted the essence of the Secretary's recommended modification of section 6; it is reflected in the language of section 8 as reported to the Senate,[50] and as finally enacted.[51]

There can be no doubt, on this record, that in proposing section 8 the Senate subcommittee intended to adopt the Administration's position that the reclamation laws, and specifically acreage limitations, should apply to irrigation uses of all projects authorized by the bill, including the Kings River project, even though the projects were to be built by the Corps of Engineers.

On the floor of the Senate a final attempt was made to bar application of acreage limitations to the California projects authorized by the 1944 Act, but it was turned back.

The President and Secretary Ickes persisted in their efforts to have projects in the general Central Valley area, including Pine Flat Dam, built by the Bureau of Reclamation rather than the Corps of Engineers, as the House bill provided. However, they welcomed the provision in section 8 making reclamation laws ap-

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[49]The full text of Secretary Ickes' proposed revision of § 6 of the House bill was included in his letter to Chairman Bailey. *See* note 46.

[50]Senator Millikin of Colorado offered a substitute for § 6 of the House bill that was essentially the same as that proposed by the Secretary. 1944 Senate Hearings, *supra* note 35, at 548-49. The subcommittee adopted the substitute with minor changes. *See* 90 Cong. Rec. 8233; 41 Op. A.G. at 389-90. The committee report recites that the committee redrafted the section to make it acceptable to the Secretary of the Interior with respect to the "various technical features of the Federal reclamation laws" mentioned in the text:

> During the hearings and also by letter the Secretary of the Interior expressed to the committee his views with regard to the utilization of multiple purpose projects under the control of the War Department where irrigation may be involved and he expressed the view that the language in H.R. 4485, if modified, would provide for more effective administration in relation to the various technical features of the Federal reclamation laws. The committee therefore recommends the adoption of amendment No. 10 which is generally in accord with existing law and the expressed views of the Secretary of the Interior.

S. Rep. No. 1030, 78th Cong., 2d Sess. 4 (1944).

[51]*See* note 4.

plicable to irrigation features of dams built by the Engineers. Each specifically mentioned the acreage limitations in connection with that section. Secretary Ickes warned that an effort would be made to amend or delete section 8 on the floor of the Senate.[52]

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[52]The President wrote:

> It may well be that testimony before your committee in favor of the construction of these projects by the Corps of Engineers was a reflection of the desire of certain large land interests in California to obtain irrigation and other benefits without being subjected to the repayment requirements and to the other public safeguards that are a part of the reclamation law, but I do not believe that this should be allowed to obscure the fundamental objectives of that law. *In this connection, I was pleased by the inclusion of the irrigation amendment.* But this amendment will not assure that the planning, design, construction, and operation of these reservoirs shall be such as to fulfill the *primary* need for conservation and beneficial consumptive use of water. I hope, therefore, that the Congress will see fit to place in the Bureau of Reclamation the authority and the responsibility for accomplishment of the great objectives that the Federal Government should achieve in California.

Letter from Franklin D. Roosevelt to Senator John H. Overton, Aug. 7, 1944, 90 Cong. Rec. 8623 (emphasis added).

Secretary Ickes took a similar position:

> Section 8 of the bill, as reported, wisely invokes the reclamation laws in the use of projects for irrigation purposes. However, the bill as it passed the House contained no such provision, and in the Senate, it is understood, an attempt will be made to amend or delete section 8. The reclamation policies of this country, in effect for more than 40 years, are designed to encourage family-type farms and to discourage speculation. They should not be changed or set aside in the course of a hurried consideration of a flood-control bill authorizing projects at some indefinite future date.
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> . . . The Central Valley project, as authorized by Congress, is operated by the Bureau of Reclamation; the Bureau has built dams and irrigation works, and markets the surplus power. The present bill changes the pattern. It puts two different agencies, in two different departments, at work on a multiple-purpose project where the utmost coordination is essential. Thus the effect of this section is harmful to good administration. *Furthermore, it would be extremely harmful were section 8 deleted and sound reclamation policies disregarded as they were in the bill as it passed the House.*

Memorandum attached to Letter from Harold L. Ickes to Senator Alben W. Barkley, Nov. 22, 1944, 90 Cong. Rec. 8315, 8316 (emphasis added). *See also* Letter from Harold L. Ickes to the Vice President, Nov. 21, 1944, 90 Cong. Rec. 8624-25.

The challenge anticipated by Secretary Ickes appeared in the form of two amendments proposed by Senator O'Mahoney of Wyoming. One sought to amend section 6 of the bill reported by the Senate committee to authorize the Secretary of War to contract for the storage of water for any beneficial use in any reservoir constructed by the War Department, "on such terms and conditions as he may deem reasonable."[53] Objection was immediately raised that this would permit the Secretary of War to sell water for irrigation use on such terms and conditions as he chose, and thus would "change the basis of the reclamation law."[54] Senator Hatch stated that the amendment would permit "the Army Engineers . . . to supply water . . . entirely removed from . . . the acreage limitations and the other basic foundations of our irrigation law."[55]

The second O'Mahoney amendment sought to make two changes in section 8 as reported by the Senate committee. It would have deleted the provision in section 8 that dams and reservoirs under the jurisdiction of the Secretary of War could be utilized for irrigation only in conformity with section 8, and thus with the reclamation laws; and it would have made section 8 inapplicable "to any dam or reservoir heretofore or hereafter constructed which supplements any existing locally operated irrigation system or other locally operated water facilities."[56]

A letter from Secretary Ickes, in opposition to these proposals, pointed out the effect of the two amendments proposed by Senator O'Mahoney: "[T]he projects included in the bill for the great Central Valley area of California (Sacramento-San Joaquin River Basin, p. 31, H.R. 4485) would supplement some existing locally operated irrigation systems. Those projects, therefore, would be left subject only to section 6 which, as the Californians would have it amended, disregards the Federal reclamation laws while placing the Corps of Engineers in the irrigation field."[57] Senator Overton, chairman of the Senate subcommittee, also opposing the

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[53] 90 Cong. Rec. at 8548.

[54] 90 Cong. Rec. at 8548 (Senator Hayden).

[55] 90 Cong. Rec. at 8549.

[56] 90 Cong. Rec. at 8550.

[57] Letter from Harold L. Ickes to Senator Lister Hill, Nov. 29, 1944, 90 Cong. Rec. 8545, 8546. *See also* Letter from Harold L. Ickes to the Vice President, Nov. 21, 1944, 90 Cong. Rec. 8624-25.

amendment, advised the Senate that section 8 had been included "at the request of the Secretary of Interior, and at his very earnest insistence," and "word for word as recommended by the Secretary of the Interior."[58]

Senator Hayden moved that both amendments be referred to the Committee on Irrigation and Reclamation, on the ground that they would alter existing reclamation law and therefore should be considered by the committee with jurisdiction over that subject matter. The motion was adopted.[59]

The disposition of the O'Mahoney amendments reflects the Senate's understanding that, under section 8, the reclamation laws, and specifically acreage limitations, would apply to utilization of water for irrigation on projects authorized for construction by the Corps of Engineers in the Sacramento-San Joaquin River Basin, including Pine Flat Dam on the Kings River. If this had not been so the proposed amendments would have served no purpose. The amendments were rejected precisely because they would have changed reclamation law, which both sides assumed to be applicable to such projects as section 8 read.

This conclusion was reaffirmed the following day in the course of Senate consideration of a proposal by Senator Murray of Montana to transfer "all functions, powers, duties, and projects" of the Secretary of War with respect to water conservation reservoirs in the west to the Secretary of the Interior, thus completely ousting the Secretary of War from these activities.[60] Senator Murray based his proposal in part upon a desire to assure "that the Federal reclamation laws, with their various provisions for the development of family-size farms and the prevention of speculation in lands, should be made applicable to all reservoir projects in the west." Senator Murray continued, "If the policy of the family-size farm . . . is to be accomplished, then these projects must be built, operated, and maintained by the Bureau of Reclamation under the reclamation laws."[61]

In response, Senator Overton assured the Senate that Senator Murray's objectives with respect to the application of reclamation

[58] 90 Cong. Rec. at 8550.
[59] 90 Cong. Rec. at 8550.
[60] 90 Cong. Rec. at 8616.
[61] 90 Cong. Rec. at 8622.

law to irrigation in projects authorized by the bill would be achieved under section 8, which would make reclamation law applicable to the irrigation features of projects constructed by the Engineers. Senator Overton made this point with specific reference to projects in the Sacramento-San Joaquin River Basin. After referring to the President's suggestion that the federal agency with the dominant interest in a particular project should construct it, Senator Overton continued:

> The able junior Senator from Montana has made considerable comment in reference to the Sacramento and San Joaquin Rivers and the Central Valley, in California. The principle to which I have just referred was carried out in respect to the projects contained in the bill which were authorized for those streams. The testimony shows, I think rather conclusively, that the projects herein authorized to be constructed by the Army engineers are ones in which flood control predominates over irrigation. *Of course, the Senate will understand that, insofar as irrigation is concerned, all surplus water which can be used for irrigation is turned over to the Department of the Interior, and the method of irrigation and the operation of the irrigation works are under the control of the Department of the Interior.*[82]

Senator Overton also informed the Senate that the Corps of Engineers "had absolutely no objection whatsoever to the irrigation and power amendments [sections 8 and 5] which were suggested by the Secretary of the Interior . . . and were subsequently incorporated in the pending bill. The engineers stated that they were perfectly willing . . . to turn over to the Bureau of Reclamation the distribution of all surplus water held back by the dams constructed by them, *the distribution of which would come under the reclamation law*, or would follow whatever method Congress might determine upon."[83] Senator Murray's amendment was then rejected.

The Senate adopted the committee's proposed substitution of the present section 8 for section 6 of the House bill. The Senate version was accepted by the conference committee, and enacted into

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[82] 90 Cong. Rec. at 8625 (emphasis added).
[83] 90 Cong. Rec. at 8626 (emphasis added).

law with minor modifications not pertinent here. During the brief Senate debate on the conference report, Senator Overton, the flood manager of the bill, and Senator Hill, the Acting Majority Leader, engaged in the following colloquy for the express purpose of removing any possible doubt as to the applicability of section 8 to the Kings River project:

> Mr. HILL. There still seems to be confusion on the part of some Senators with reference to the application of reclamation laws in regard to some of these projects.
>
> I heard the distinguished senior Senator from Louisiana, when the bill was under consideration, and I think he made it very clear. However, I wish to ask this question: Is it not a fact that section 8 of this bill, as agreed to in conference, makes some reclamation laws applicable to the handling of irrigation water of any of the projects, including California projects, where it is found that irrigation may be carried out? *I ask the Senator in charge of the bill whether it is not a fact that the President wanted the California projects in this bill constructed under the Bureau of Reclamation so that the water policies would conform to reclamation laws?*
>
> Mr. OVERTON. The Senator is correct with respect to the projects in the so-called Central Valley of California. The President wrote me and the chairman of the subcommittee in this regard. However, *in view of the fact that the Senate amendment made not only the California projects but all such projects subject to irrigation laws, and in view of the fact that the House concurred in this action by agreeing to section 8 of the Senate bill, I am sure that the President will feel that we have met the problem that he raised. Section 8 of the bill clearly places reclamation uses of water from these projects under the Secretary of the Interior and under the applicable reclamation laws. No project in this bill which may include irrigation features is exempted from the reclamation laws.*
>
> Mr. HILL. I thank the Senator.
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> Mr. OVERTON. The Senate amendment made not only the California projects, but all such projects subject to the irrigation law. In view of the fact that the House concurred in that action by agreeing to section 8 of the bill, I am sure the Senator from Alabama will feel that we have met the

question which he has raised. As I stated a while ago, section 8 of the bill clearly places reclamation uses of waters from all projects authorized in this bill under the Secretary of the Interior, and under the applicable reclamation laws.[64]

The report of the House conferees, though in general terms, also made it clear that section 8 reflected the wishes of the Secretary of the Interior with respect to the application of reclamation law to utilization of multiple-purpose projects for irrigation.[65] There is nothing in the brief House debate on the conference report to contradict this interpretation or the more explicitly expressed views of Senators Hill and Overton.[66]

Appellees' general response to this overwhelming evidence of congressional purpose contrary to their position is to ignore it. In a variety of ways appellees press the argument that Congress did not intend that reclamation law, and particularly acreage limitations, would apply to the Kings River project because the dominant need for Pine Flat Dam was flood control, a matter within the special expertise of the Corps of Engineers; because private irrigation facilities were already in existence in the project area and no additional irrigation facilities were to be constructed; because the water of the Kings River had been completely appropriated and no additional water would be made available by the project; and because the project would bring no additional arid land under irrigation. The obvious difficulty with this argument is that it is contrary to the whole tenor of the legislative history. As has been seen, the legislative struggle was waged on precisely this ground. The very considerations appellees now advance were pressed upon Congress. Congress deliberately decided that while the Corps of Engineers should build Pine Flat Dam on the Kings River and control its operation for flood control, Pine Flat and all other multiple-purpose dams thereafter constructed should be utilized for irrigation under the provisions of the reclamation laws. This was the very purpose of section 8; it was adopted with the Kings River project and other nearby projects specifically, and primarily, in mind.

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[64] 90 Cong. Rec. at 9264 (emphasis added).

[65] H.R. Rep. No. 2051, 78th Cong., 2d Sess. 7 (1944).

[66] 90 Cong. Rec. at 9277-87.

Viewing the conflict in the broader perspective of the reclamation program as a whole, any other outcome would have been surprising. The reclamation program is not primarily one of bringing arid lands under irrigation for the first time. Congress was advised as early as 1924 that one of the first projects approved under the 1902 Act, if not the first, was the Salt River project in Arizona, in which nearly all of the land was privately owned and under irrigation through a system of private canals. The function of the federally financed reclamation reservoir was to furnish water storage needed to conserve and regulate the existing water supply. Six other similar projects were also called to Congress' attention.[67] At this early date, Congress was warned, "It seems certain that the aid of the Government will be sought in the future to rescue meritorious but distressed private projects . . . ."[68] The forecast was accurate. The number of instances in which the federal project supplemented existing irrigation steadily increased. In 1961 it was estimated that 60 percent of the total reclamation acreage fell in this category.[69] In the Madera Irrigation District, one of the projects involved in the Ivanhoe Irrigation District litigation, 85,000 of a total of 112,000 acres had been developed for irrigation before the federal project was authorized.[70] The opinion in *Ivanhoe* takes note of the fact that there was widespread pre-project reclamation and irrigation development before lands were brought within the Central Valley project. 357 U.S. at 283. So general is this phenomenon that a recent commentator has stated, "reclamation today generally supplies only supplemental water."[71] In most

[67]Federal Reclamation by Irrigation, S. Doc. No. 92, 68th Cong., 1st Sess. 131 (1924).

[68]*Id.* at 133.

[69]Acreage Limitation Policy, *supra* note 9, at 82-83.

[70]*See* Madera Irrigation Dist. v. All Persons, 47 Cal.2d 681, 686, 306 P.2d 886, 889 (1957).

[71]2 Waters & Water Rights § 120.2, at 215 (R. Clark ed. 1967).
The statement was made in discussing the very issue involved here:

> Another ground for departing from the statutory acreage limitation is that the project is merely providing supplemental water to an already developed area. This fact in itself is hardly a justification, because reclamation today generally supplies only supplemental water.

See also J. Sax, *Selling Reclamation Water Rights: A Case Study in Federal Subsidy Policy*, 64 Mich. L. Rev. 13, 33 (1965).

of the respects in which appellees seek to distinguish the Kings River project from other projects Congress has made subject to the reclamation laws, therefore, the Kings River project is not an exception, it is the rule.

Appellees assert, however, that the Kings River project is unique in the respect that *all* of the water of the Kings River had been appropriated, and the project therefore would produce no "new" or "surplus" water.[72] Appellees' factual premise is questionable, but if it were not, it would not follow that the project does not confer substantial benefits justifying imposition of acreage limitations. The Corps of Engineers and the Bureau of Reclamation agreed that approximately half of the costs of Pine Flat Dam were allocable to irrigation benefits, resulting principally from regulation of the river flow.[73] There would be no inherent unfairness in applying acreage limitations in these circumstances. The federally financed reservoir confers substantial economic benefits upon the landowners by making water available when it otherwise would not be. The price at which excess lands must be sold will include the whole of any value attributable to preexisting irrigation facilities and water rights; only the increase in value attributable to the federal project itself will be excluded.[74]

[72]Contrary to appellees' contention, application of acreage limitations to a project intended primarily to improve vested water rights would not appear to be unique. *See, e.g.*, Middle Rio Grande Water Users Ass'n v. Middle Rio Grande Conservancy Dist., 57 N.M. 287, 258 P.2d 391 (1953); Application of Frenchman Valley Irrigation Dist., 167 Neb. 78, 91 N.W. 2d 415 (1958); Hearings on H.R. 13921 before the House Committee on Irrigation of Arid Lands (Part II), 63d Cong., 2d Sess. 3-11 (1914).

[73]*See* note 10.

[74]*Cf.* Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 285 (1958); Solicitor's Opinion M-36011, Sept. 23, 1949, *cited in* Acreage Limitation Policy, *supra* note 9, at 22.

Section 46 of the 1926 Act provides that excess land shall be appraised in a manner prescribed by the Secretary of the Interior and the sale price fixed by the Secretary "on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works."

The repayment contract between the United States and the Tulare Lake Canal Company echoes the language of section 46, providing for an appraisal "on the basis of the actual bona fide value of such lands at the date of the appraisal without reference to the irrigation benefits of the Project." Under the contract, any given tract of excess land will be

If in the case of the Kings River project the increment is small, as appellees contend, the price appellees will receive for their excess lands will be only slightly below full market price; if it is large the difference will, and should be, concomitantly substantial. In any event, as with all of the other distinguishing features relied upon by appellees, Congress was fully apprised of the almost complete appropriation of Kings River water under existing agreements,[75] and was urged not to authorize construction and operation of Pine Flat Dam by the Bureau under the reclamation laws for this reason, among others.[76] Nevertheless, Congress decided that acreage limitations should apply.

Appellees go so far as to suggest that application of acreage limitation provisions to the Kings River project would be impractical, even absurd, and Congress cannot be thought to have intended this result. The President of the United States, the Secretary of the Interior, and the Commissioner of the Bureau of Reclamation repeatedly urged Congress to provide that the Kings River project and those adjacent to it should be built, maintained, and operated by the Bureau of Reclamation in full compliance with the reclamation laws, including acreage limitations. It is unlikely that a position so insistently pressed by the persons most knowledgeable and in highest authority in the executive branch would be as questionable as appellees suggest. At the very

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appraised only after the owner of the tract executes a recordable contract agreeing to have his land appraised without reference to project benefits and committing himself to dispose of his excess land at this appraised value. The recordable contracts have not yet been executed, pending the outcome of this case. Thus, the sale price of excess land will be established on the basis of the ex-project market value of the land on or after the date at which the landowner agrees to sell it.

[75] H.R. Doc. No. 630, 76th Cong., 3d Sess. 7 (1940); H.R. Doc. No. 631, 76th Cong., 3d Sess. 10-12 (1940).

[76] *See, e.g.*, 1944 House Hearings, *supra* note 13, at 741-42, 762, 767; 1944 Senate Hearings, *supra* note 35, at 284-86, 300-02.

Finally, references to "surplus" water in the legislative history relied upon by appellees appear to have nothing to do with whether the water was previously appropriated. For example, Senator Overton's use of the word "surplus" during the Senate hearings was in connection with a provision in the Rivers & Harbors Bill similar to § 8. The water referred to was that which would not be necessary to maintain the water level for the primary navigation purposes of the projects authorized in that bill. 1944 Senate Hearings, *supra*, at 222.

least, Congress could reasonably conclude that what these men urged as required by the public interest and the historical reclamation policy was not illogical or absurd. And of course it was not.[77]

Appellees discuss only Tulare Lake Basin—which, they say, has no dwellings or economic source of domestic water, is subject to periodic flooding involving economic risks too great for small farmers to bear, and still has an erratic water supply. Assuming

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[77]Opposition to application of the reclamation laws to the Kings River project during the 1944 hearings was not premised on the argument that family farms could not succeed, and there is no indication that either Congress or the Department of the Interior believed this to be true. The objections were based upon the pre-existence of irrigation facilities, the complete appropriation of existing water, and the absence of public or additional arid lands to be reclaimed. When the Kings River project was under consideration, Commissioner Bashore emphasized to the House Flood Control Committee the importance of creating homes, especially for soldiers returning from the war. 1944 House Hearings, *supra* note 13, at 643, 644, 672, 678. The need to create homes was also mentioned in connection with the Kings River project during the Senate hearings. 1944 Senate Hearings, *supra* note 35, at 215, 460.

Several times during the 1944 House hearings the Department of the Interior indicated that a modification of the excess land laws might be recommended for the Kings River project, not because it thought smaller farms were not feasible, but because it might be inequitable to impose rigid acreage limitations upon an already established economy. 1944 House Hearings, *supra*, at 642-43, 678. No modification was in fact proposed.

Appellees rely in part on a Bureau of Reclamation study and related memoranda prepared in 1947, three years after the Flood Control Act was passed. *See* Bureau of Reclamation Report on Possible Changes in Types of Farming in the Tulare Lake Area in California (1947); Memorandum from Regional Supervisor of Operation & Maintenance to L. O. Graham et al., Sept. 2, 1947, and attached Draft Memorandum; Memorandum from Paul H. Johnstone, Chief Economics & Statistics Div., Sacramento Regional Office, Bureau of Reclamation, to the Regional Director, Sept. 12, 1947. The 1947 study and memoranda concluded that acreage limitations should be modified or eliminated on the Kings River project, primarily in the Tulare Lake Basin. These documents were drafted in support of the position that *Congress* should create an exemption from the acreage restrictions for that project. There was no assumption that the limitations did not then apply. The conclusions reached in the 1947 study and memoranda were not adopted by the Department of the Interior; the Department has never recommended exempting legislation, and none has been enacted.

all of this, Tulare Lake Basin is not the Kings River project. The Basin includes just over 200,000 acres; the Kings River project contains 1,065,000 acres. No one suggests that it would be impracticable to apply acreage limitation provisions to the project land outside the Basin. Indeed, more than 80 percent of this land is now in individual ownerships in tracts of 160 acres or less. Presumably Congress rested its decision upon the feasibility of acreage limitation in the project as a whole, not the Basin alone, and properly so.

But even as to the Tulare Lake Basin, appellees' argument is unsound. The lack of on-site housing and domestic water supply is irrelevant. Since 1910 Bureau regulations have provided that the statutory residence requirement is satisfied if the owner lives within 50 miles of his land;[78] a glance at a map will reveal the presence of many communities within this distance of Tulare Lake Basin.[79] Only a small part of Tulare Lake Basin is still subject to frequent flooding.[80] If events were to establish that small individual operations were not practicable on land subject to this residual flood risk, or as to which the water supply may still be too erratic, leasing or consolidation of ownerships would no doubt follow.[81] Congress may well have recognized that even if these adjustments occurred, substantial public interests would have been

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[78]38 I.D. 620, 637 (1910); 43 C.F.R. § 230.65 (1974).

[79]The United States National Water Commission reports, "In California, the Commission was told many reclamation farmers as well as nonreclamation farmers tend to live in town and commute to the farms." National Water Comm'n, Water Policies for the Future 147 (Final Report 1973).

[80]There was expert testimony at trial that if flood control dams had been in operation, flooding would have affected as much as 20,000 acres of the Basin in only 11 of the previous 122 years, and that floods as severe as those in 1969, when 89,000 acres were under water, would have occurred only four times during this period of a century and a quarter.

[81]In the Central Valley project, where almost complete compliance with the excess land laws has been attained, many individual landowners have leased their lands to individual or corporate operators. H. Hogan, Acreage Limitation in the Federal Reclamation Program 119-21, 127-28 (Study prepared for the National Water Commission 1972) (Distributed by National Technical Information Service, U.S. Dep't of Commerce). It has been said that farming of a number of separately owned tracts by a single operator may become "the Reclamation equivalent of the condominium in apartment house ownership operation." *Id.* at 127.

served by initial breakup of excess holdings at nonspeculative prices. The value of the increased productivity of the land and the substantial nonreimbursable flood control subsidy would have been widely distributed rather than accruing to the few who happened to own large tracts of land when the dam was built. An opportunity would have been afforded for persons of modest means to purchase a small tract of land and establish a farm under the improved water conditions. Even if this should prove infeasible, the changes that did occur would at least reflect the benefits provided by the project; the agricultural economy that emerged would not be dictated by a landownership pattern that existed prior to the substantial public investment.

Appellees argue that section 8 is inapplicable to the Kings River project because section 10 of the Act authorized this project "substantially in accordance with the plans contained in House Document Numbered 630," the report submitted by the Corps of Engineers. Appellees point out that this report recites the various characteristics of the Kings River service area and its water rights along the lines set out above, and, further, that the report says nothing to indicate that acreage limitations were to be imposed.[82] But it is also true that there is nothing in the legislative history to support appellees' premise that if Pine Flat Dam were built on Kings River by the Corps of Engineers in accordance with its plan, section 8 would not apply to the project. The legislative history is precisely to the contrary.[83]

Appellees also contend that the language of section 8 itself excludes the Kings River project.[84] They argue that the third sentence of section 8 (on which the United States' argument for application of reclamation law to the Kings River project rests) is modified by the first two sentences of section 8; and, therefore, that reclamation law applies to dams operated under the direction

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[82]This is equally true of the Bureau of Reclamation Report proposing construction of the Kings River project. H.R. Doc. No. 631, 76th Cong., 3d Sess. (1940).

[83]Appellees also rely upon the provision in § 10 that the Secretary of War was to make arrangements for payment for conservation storage in the Kings River project. *See* note 27. They point to nothing in the legislative history to support the theory that the agency selected to negotiate repayment affected the application of § 8.

[84]Section 8 is reproduced in note 4.

of the Secretary of War only if the conditions of the first two sentences are satisfied, including the condition that additional works be constructed by the government for irrigation purposes. No such works were built on the Kings River project; ergo, section 8 does not apply. This interpretation would make the third sentence wholly redundant. As the legislative history demonstrates, this sentence was intended to convey a great deal of meaning. Its message is clear from a careful reading of all three sentences, even without resort to the legislative history. The whole of section 8 applies, of course, only to projects that are being operated under the direction of the Secretary of War. The first two sentences deal with situations in which additional works *are* required to realize the irrigation potential of such a project. In these cases a feasibility determination must be made by the Secretary of War, and authorization for construction of the additional works must be obtained from Congress. Such additional works are then to be constructed, operated, and maintained by the Secretary of the Interior under the reclamation laws. The third sentence is general in coverage; it provides that *all* dams operated under the direction of the Secretary of War are to be utilized for irrigation only in conformity with the section, i.e., under the reclamation laws; thus bringing under those laws dams for which no additional irrigation facilities are required.

The legislative history verifies the correctness of this interpretation. In Judge Stone's succinct analysis before the Senate sub-committee, section 8 prescribes "that where there are irrigation benefits in a flood control reservoir, *or* if there are other facilities to be constructed by the Reclamation Bureau, to make use of the water stored for irrigation, then there must be compliance fully with the reclamation law."[85] Congress was repeatedly advised that a well developed private irrigation system already existed on the Kings River, yet section 8 was adopted with the Kings River proj-

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[85] 1944 Senate Hearings, *supra* note 35, at 561-62 (emphasis added). Judge Stone continued:

> We see no reason why in the West where reclamation is practiced there should be any difference in the use of water for irrigation, from a reservoir constructed by the Corps of Army Engineers and a reservoir constructed by the Bureau of Reclamation.

Judge Stone's remarks were addressed to § 6 as proposed by Senator Millikin, which was also the Secretary of the Interior's proposal that eventually became § 8.

ect and adjacent projects primarily in mind, for the specific purpose of making the reclamation laws, including acreage limitations, applicable. Moreover, the Senate refused to adopt the O'Mahoney amendment that would have exempted from section 8 "any dam . . . which supplements any existing locally operated irrigation system."[86] To read section 8 as appellees suggest would be to include by implication the substance of the O'Mahoney amendment that Congress expressly declined to adopt[87]—an amendment specifically directed at the Pine Flat Dam, among others.

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[86] *See* text at notes 52-59.

[87] Senator Millikin stated that the two O'Mahoney amendments have the combined purpose of not subjecting all of the detail of the reclamation law to projects where the Army engineers have a reservoir in the middle of an existing privately owned irrigation system, where those who have that private irrigation system are in independent position to take the water and therefore should not be required to go through all the incidents of a reclamation project started from grass roots.
90 Cong. Rec. 8549. This was an apparent reference to the requirement for initial breakup of excess holdings imposed by § 46 of the 1926 Act.

The House of Representatives did not directly reject a similar proposal, but when § 6 of the bill reported by the House Flood Control Committee was amended on the floor of the House to make it inapplicable in situations in which the federal project supplemented a locally operated irrigation system, that amendment was limited to dams that were already in existence in 1944, and therefore would not have applied to Pine Flat Dam. 90 Cong. Rec. 4204.

It has also been argued that the Senate recognized that additional works would be necessary to make § 8 applicable to any given flood control project because the Senate rejected an amendment offered by Senator Murray of Montana to modify the third sentence of § 8 to read: "Dam[s] and works authorized by this act may be utilized for irrigation purposes only in conformity with the provisions of said Federal reclamation laws and this paragraph." *See* 90 Cong. Rec. 8618. The short and complete answer is that Senator Murray offered no such amendment, and apparently refrained from doing so because, as pointed out by Senator Overton, its substance was incorporated in the present language of § 8.

While discussing his separate and much broader proposal to transfer all civilian dam-building functions to the Bureau of Reclamation, *see* text at notes 60-63, Senator Murray simply referred to an amendment, of which the quoted passage was part, that he had proposed *during the hearings before the House Flood Control Committee.* At that time, the bill read as it had been introduced in the House. It did not include the present § 8. *See* 90 Cong. Rec. 8618; 1944 House Hearings, *supra* note 13, at 935. In response Senator Overton said:

Enough has been said to dispose of appellees' related argument that section 8 was intended to apply only to the reclamation of "arid" lands (meaning, in appellees' argument, lands not already under irrigation) because section 6 of the House bill used this adjective and section 8 was intended to accomplish only "technical" changes in the House version. Only a brief exposure to reclamation jargon is required to learn that all of the land area of the United States west of the 98th meridian is commonly referred to as "arid or semi-arid." The only support for appellees' argument is a self-serving statement by the water master for the Kings River Water Association in the course of the Senate committee hearings that section 6 of the House bill "will not affect us because we have no arid lands. Our irrigation systems are complete. . . . Consequently, that section should not apply to us."[88] No member of the Senate subcommittee commented on the water master's statement. No further mention was made of this notion by either side during the hotly contested effort on the floor of the Senate to exclude the Kings River project and similar projects from section 8.

Some reliance is placed upon incidents occurring after the 1944 Act was passed. They appear to be both trivial and irrelevant. For example, Secretary Ickes claimed a "sweeping defeat of the California interests,"[89] and drafted a presidential press release in

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> [Senator Murray] did appear before the House Committee on Flood Control, and he filed with that committee, without reading, a written statement. In that written statement he did propose the amendments to which he has referred. *Substantially, however, those amendments have been incorporated in the present bill.* They are not word for word as suggested by [Senator Murray], but they are substantially the same. They relate to irrigation and electric power. It is my understanding that both those amendments meet with the approval of the Department of the Interior and the Bureau of Reclamation.

90 Cong. Rec. 8625 (emphasis added).

[88] 1944 Senate Hearings, *supra* note 35, at 302-03. The lands were not "arid" in appellees' sense because they were receiving water through the existing locally operated irrigation system. As we have shown, the existence of a private irrigation system is not relevant to the application of § 8.

[89] In a letter recommending that the President sign the 1944 Act, Secretary Ickes wrote:

much this tenor. President Roosevelt instead issued a moderate and restrained announcement. This is hardly a significant indication of the meaning of the statute, especially since there is no evidence that the President disagreed with the Secretary's conclusion. A second example: The Chief of Engineers initially took the position that under section 10 the Secretary of War rather than the Secretary of the Interior was to negotiate repayment contracts with water users on the Kings River and Kern River projects.[90] Eventually, albeit after some pressure from the White House, the Chief of Engineers joined with the Commissioner of Reclamation in a public announcement acknowledging that the Department of the Interior was to be the contracting agency and that the repayment contract was to be negotiated under reclamation law.[91] Whatever the merits of the controversy over which agency should negotiate

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Were H.R. 4485 to be approved, the situation of the California projects would be as described below. The Corps of Engineers would be authorized to build a number of projects in the Central Valley area of California, including the Kings River Project and the Kern River Project. . . . Under section 8 of the bill, the use of water from those projects for irrigation purposes would be subject to the jurisdiction of the Secretary of the Interior and would be governed by the Federal reclamation laws. . . . Hence these projects can and will be integrated into the Central Valley Project. I believe that the undertaking of physical construction by the Corps of Engineers, instead of by the Bureau of Reclamation, if that ultimately becomes necessary, is a price worth paying for the sweeping defeat of the California interests who oppose the power policies and the land policies of the Administration.

Letter from Harold L. Ickes to Harold D. Smith, Director, Bureau of the Budget, Dec. 20, 1944.

[90] *See* Letter and Enclosure from E. Reybold, Chief of Engineers, to Harry W. Bashore, Sept. 4, 1945; Letter from the Secretary of War to the Secretary of the Interior, Feb. 15, 1946; Letter from R. A. Wheeler, Chief of Engineers, to Senator Carl Hayden, Mar. 8, 1946, Hearings on H.R. 5400 before a Subcommittee of the Senate Appropriations Committee, 79th Cong., 2d Sess. 523-25 (1946).

[91] The statement read, in part, "the Corps of Engineers will start construction after costs are allocated with the concurrence of the Secretary of the Interior, and after required payments are insured by contract, *under the Reclamation Law*, between the water users who are beneficiaries of the development and the Secretary of the Interior." Joint Statement of R. A. Wheeler, Chief of Engineers, and Michael W. Straus, Commissioner of Reclamation, June 24, 1946, H.R. Doc. No. 136, 80th Cong., 1st Sess. 49-50 (1947) (emphasis added).

the contract, it is clear from the legislative history as a whole that the terms negotiated were to be in conformity with the reclamation laws, and particularly with acreage limitation provisions. This was the conclusion reached by the Attorney General in his 1958 opinion. 41 Op. A.G. 377 (1958).

In sum, the Flood Control Act of 1944 made the provisions of section 46 of the Omnibus Adjustment Act of 1926 applicable to the Pine Flat project.

II

We consider next whether, by repaying construction charges, owners of excess lands may avoid the obligation under section 46 to execute recordable contracts with the Secretary of the Interior providing for the sale of their excess lands at ex-project prices.[92] This is the more far-reaching of the two grounds for the district court's decision since it affects all federal reclamation projects subject to section 46 of the 1926 Act, not just those authorized in the Flood Control Act of 1944.[93]

It will be demonstrated in the discussion that follows that appellees' "payout" theory is not supported by the language of section 46, the purpose and legislative history of the section, or the administrative practice of the Department of the Interior.

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[92]The recordable contracts to be signed by owners of more than 160 acres of land in the Kings River project authorize the Secretary of the Interior to sell their excess holdings at ex-project prices if the owners have not done so within 10 years. The Department has utilized this procedure to implement § 46 since the 1926 Act was passed. *See* U.S. Bureau of Reclamation, Landownership Survey on Federal Reclamation Projects 46-47 (1946).

[93]Section 46 of the 1926 Act is, with few exceptions, applicable to all projects built after 1926. These projects contain the vast majority of lands receiving water from federal reclamation projects. In 1924 only about 1,300,000 acres were under irrigation in federal reclamation projects. Federal Reclamation by Irrigation, S. Doc. No. 92, 68th Cong., 1st Sess. 60 (1924). By 1970 almost 8,570,000 acres were receiving either full or supplemental water service from federal projects, and 10,198,000 irrigable acres were available for service. Hogan, *supra* note 81, at 1. Private lands included in the 7 million acres brought under irrigation since 1924 are covered by § 46 of the 1926 Act unless the particular project is expressly exempted. Private lands have always predominated in federal reclamation projects, especially in more recent projects. *See, e.g.*, Acreage Limitation Policy, *supra* note 9, at 82-83.

A.

The Statutory Language

Nothing in section 46 suggests that owners of excess lands may at their option prepay construction charges in lieu of agreeing to sell their excess lands at nonspeculative prices. The language of the section is unequivocal and unqualified: (1) "No water shall be delivered" from any new project until the Secretary of the Interior has contracted with an irrigation district or districts for payment of costs of construction; (2) such contracts "shall . . . provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty acres shall be appraised . . . and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value . . . without reference to the proposed construction of the irrigation works"; and (3) "no such excess lands so held shall receive water from any project . . . if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands . . . at prices not to exceed those fixed by the Secretary . . . ."[94]

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[94] Section 46 provides in pertinent part:

> No water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid within such terms of years as the Secretary may find to be necessary, in any event not more than forty years from the date of public notice hereinafter referred to, and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. . . .
>
> Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of

The language attaches no significance to repayment of construction charges. If owners of excess land were to receive project water but escape the obligation to contract to sell excess holdings at ex-project prices by repayment of construction costs, this means of avoiding the apparently absolute condition imposed by section 46 would have to be implied.

For reasons which follow, implying such an exception to the mandate of section 46 would be unwarranted. As will be shown, such an exception would frustrate the purpose of Congress to secure the division and redistribution on a nonspeculative basis of large private landholdings receiving the subsidy of government-financed irrigation benefits. It would be inconsistent with the legislative and regulatory antecedents of section 46 of the 1926 Act, and particularly with section 12 of the Reclamation Extension Act of 1914.[95] It would be contrary to interpretive conduct of the Department of the Interior in administering the reclamation laws, beginning shortly after the adoption of the Reclamation Act of 1902[96] and continuing to date, with a relatively brief hiatus during the 1950's founded upon an obviously mistaken and soon repudiated ruling.

B.

The Congressional Purpose

It is a basic goal of the reclamation laws to create family-sized farms in areas irrigated by federal projects. It is also a basic goal of the reclamation laws to secure the wide distribution of the substantial subsidy involved in reclamation projects and limit private speculative gains resulting from the existence of such projects.

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the Interior; and that until one-half the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior and that upon proof of fraudulent representation as to the true consideration involved in such sales the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sales . . . .

44 Stat. 649-50, *as amended*, 43 U.S.C. § 423e.

[95] Section 12, Act of Aug. 13, 1914, ch. 247, 38 Stat. 686, 689, 43 U.S.C. § 418.

[96] Act of June 17, 1902, ch. 1093, 32 Stat. 388.

Public lands on reclamation projects are made subject to entry under the homestead laws in tracts of 160 acres or less in order to preserve the public domain for actual settlers.[97] Similarly, the 160-acre limitation and the requirement in section 46 of the 1926 Act that excess lands be sold at prices excluding enhancement of value from the existence of the project were intended to effect the breakup of large tracts of private lands on reclamation projects and assure the redistribution of such lands in small tracts at non-speculative prices.[98]

In *Ivanhoe Irrigation District v. McCracken, supra,* 357 U.S. at 292, the Supreme Court recognized the vital role acreage limitation provisions play in accomplishing the historic purposes of the reclamation laws:

> From the beginning of the federal reclamation program in 1902, the policy as declared by the Congress has been one requiring that the benefits therefrom be made available to the largest number of people, consistent, of course, with the public good. This policy has been accomplished by limiting the quantity of land in a single ownership to which project water might be supplied. It has been applied to public land opened up for entry under the reclamation law as well as privately owned lands, which might receive project water.

And at 297:

> [The 160-acre limitation] is a reasonable classification to limit the amount of project water available to each individual in order that benefits may be distributed in accordance with the greatest good to the greatest number of individuals. The limitation insures that this enormous expenditure will not go in disproportionate share to a few individuals with large land holdings. Moreover, it prevents the use of the federal reclamation service for speculative purposes. In short, the excess acreage provision acts as a ceiling, imposed equally upon all participants, on the federal subsidy that is being bestowed.

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[97] Section 3, Act of June 17, 1902, 32 Stat. 388, 43 U.S.C. §§ 416, 434. *See* H.R. Rep. No. 1468, 57th Cong., 1st Sess. 8 (1902); S. Rep. No. 254, 57th Cong., 1st Sess. 2 (1902).

[98] *See* pages 63-73 & n. 156. *See also* Barry Opinion, 68 I.D. at 384-88, 391-95.

Any means of avoiding the acreage limitation and recordable contract requirements of section 46, including the "payout" theory advanced by appellees, would necessarily threaten the realization of these purposes.

Under appellees' theory, the very persons against whom the requirements of section 46 are directed, the owners of excess lands, could avoid these requirements at their option by repaying the costs of construction allocated to irrigation. It is probable that they would elect to do so. The benefits bestowed by a reclamation project often exceed the costs landowners are required to repay.[99] Users of project water for irrigation are not charged with project costs attributable to navigation, flood control, salinity prevention, production of hydroelectric power, storage of water for industrial and municipal uses, and other uses not directly related to irrigation.[100] They may, however, receive substantial benefits from such nonreimbursable expenditures. Over half the cost of the Kings River project, for example, was allocated to flood control and was not charged to irrigators.[101] Yet the benefit of flood control accrued almost entirely to irrigators through elimination of flood damage to soil, crops, and livestock in the Tulare Lake Basin[102]—a portion

[99]During the first 10 years after passage of the 1902 Act the average price of reclamation land increased by 750%, nearly seven times the general rise in land prices. Sax, *supra* note 71, at 17, *citing* 33 U.S. Bureau of Reclamation, The Reclamation Era 178-79 (1947). *See also* U.S. Reclamation Service, 13th Annual Report 26-28 (1915); U.S. Reclamation Service, 11th Annual Report 7-8 (1912); U.S. Dep't of the Interior, Annual Reports, Admin. Reports, Vol. 1, p. 88 (1908). In 1916 the Department of the Interior reported that the "material value" created by construction of irrigation works had been far greater than the cost of the project and in some cases several times greater. U.S. Dep't of the Interior, Annual Reports, Admin. Reports, Vol. 1, p. 44 (1916). It is likely that the incremental value to irrigators still exceeds the cost of irrigation projects by a substantial margin. *See, e.g.*, P. Taylor, *Excess Land Law: Secretary's Decision?*, 9 U.C.L.A. L. Rev. 1, 6-7 (1962); P. Taylor, *Excess Land Law on the Kern?*, 46 Calif. L. Rev. 153, 161-63 (1958); P. Taylor, *Destruction of Federal Reclamation Policy? The* Ivanhoe *Case*, 10 Stan. L. Rev. 76, 92-93 (1957); Hogan, *supra* note 81, at 256-62.

[100]*See generally* 2 Waters & Water Rights, *supra* note 71, §§ 112.3(B), 123.2(A).

[101]H.R. Doc. No. 136, 80th Cong., 1st Sess. 2-3 (1947).

[102]H.R. Doc. No. 630, 76th Cong., 3d Sess. 2, 7-8 (1940); H.R. Doc. No. 631, 76th Cong., 3d Sess. V, VII, 25 (1940).

of the Kings River service area in which excess holdings predominate. Obviously, it would be to the advantage of the owners of excess land to pay off construction costs allocated to irrigation and retain their excess lands, enhanced in value by this substantial additional subsidy, or sell them at prices reflecting the subsidy.[103] Moreover, the value attributable to improved productivity of the land when irrigated may exceed the cost of irrigation facilities, even aside from the element of subsidy. Congress anticipated that this would be true, and was aware of the consequent serious potential for speculation.[104] It was the purpose of the requirement of section 46 that excess lands be sold at ex-project prices to eliminate this windfall advantage.[105] Thus, because of subsidy and increased productivity, the charges to be repaid by irrigators normally represent only a part of the enhancement in value resulting from the project. By paying off the allocated costs, large landowners would secure this enhanced value for themselves at a fraction of its worth.

Perhaps such a result might be justified if the provision in section 46 for a contract to sell excess lands at ex-project prices were nothing more than a device to induce immediate repayment of the government's investment. But obviously it is not.[106] It is the means adopted by Congress to achieve broader antimonopoly and antispeculation purposes conceived by Congress to be of im-

[103]There are other substantial elements of subsidy in the reclamation program, such as liberal terms and conditions of use and repayment, and the crediting of income from the sale of hydroelectric power and project water for industrial and community purposes to reduce construction costs otherwise payable by users of irrigation water. *See generally* Water Policies for the Future, *supra* note 79, at 145; Acreage Limitation Policy, *supra* note 9, at IX; Hogan, *supra* note 81, at 230-68; Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 283, 295-96 (1958). Many of these elements of subsidy are foregone by payout. However, the persistence of others argues in favor of Professor Taylor's thesis that the 160-acre limitation should be treated as perpetual. P. Taylor, *Excess Land Law: Calculated Circumvention,* 52 Calif. L. Rev. 978, 979 (1964); P. Taylor, *The Excess Land Law: Execution of a Public Policy,* 64 Yale L.J. 477, 481-89, 495-501 (1955). *See* note 109.

[104]S. Rep. No. 254, 57th Cong., 1st Sess. 3 (1902). *See also* Summary of Costs and Benefits, *id.* at 4.

[105]Acreage Limitation Policy, *supra* note 9, at 7-8; U.S. Reclamation Service, 14th Annual Report 5-6 (1915).

[106]*See* P. Taylor, *The Excess Land Law: Execution of a Public Policy,* 64 Yale L.J. 477, 512-14 (1955).

portance to society as a whole. Section 46 was intended to accomplish the redistribution of large privately owned tracts at prices substantially below the actual value of such lands at the time of sale. It is irrational to suppose that Congress would have given an option to the owners of such excess lands to prevent the accomplishment of the purposes Congress sought to achieve—an option their self-interest would often compel them to exercise. They would be free to convert the product of large public investment to personal gain either by farming their entire holdings under the improved water supply or by selling or leasing all or a portion of those holdings at prices capitalizing the full benefits of the project. Congress' intention to secure the breakup and redistribution of such private holdings at ex-project prices by means of the requirements of section 46 would be frustrated, and the subsidy-distribution and antispeculation purposes of Congress would not be accomplished.[107]

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[107]Section 46 applies only to private lands, and the neutralization of this provision would not impede the accomplishment of Congress' antimonopoly, antispeculation, and homebuilding objectives with respect to the public lands on reclamation projects. But reclamation projects consist principally of private, not public, lands. In 1961, for example, it was estimated that "approximately 60% of the total reclamation acreage consisted of service to projects originally developed with private capital and initiation, but later brought under the reclamation program . . . ." Acreage Limitation Policy, *supra* note 9, at 82. Congress was aware of the predominance of private lands when § 46 was enacted. Two years earlier, in 1924, Congress had received the report of a Committee of Special Advisors on Reclamation appointed by the Secretary of the Interior, commonly known as the Fact Finders, pointing out that two thirds of the land in reclamation projects was privately owned. As the committee informed Congress, "the principal activity of the [Reclamation] act has been to improve conditions on private land." Federal Reclamation by Irrigation, S. Doc. No. 92, 68th Cong., 1st Sess. 133 (1924). The Reclamation Service had recognized as early as 1905 that private lands would play an important role in the reclamation program. Its observations then are worthy of note:

> [L]ands in private ownership are frequently more important or more valuable than the public lands. The great and important safeguard in this connection is the restriction of ownership of water for these lands to 160 acres. By carefully guarding this provision and insisting upon compliance with the letter and spirit of the law it will be possible to bring about the subdivision of private lands into relatively small holdings and the intensive cultivation of the soil.

U.S. Reclamation Service, 3d Annual Report 31 (1905).

The record in this case illustrates the consequences of an implied "payout" exception to section 46. The Tulare Lake Canal Company has already paid the construction charges allocated to a substantial portion of project land. The circumstances surrounding this litigation strongly suggest that others would follow suit if it were determined that by doing so the landowners would be relieved of the obligation to sell their excess land at ex-project prices. The result would be to leave as much as 30 percent of the service area in holdings of more than 160 acres. Over 157,000 acres in the Tulare Lake Basin Water Storage District alone would remain in excess holdings averaging 2,600 acres each. There would be no distribution of the flood control subsidy realized by irrigators, no limitation on windfall gains resulting from construction of Pine Flat Dam, no opportunity for others to acquire small landholdings at reasonable prices and attempt to establish family-sized farms in the Tulare Lake Basin and elsewhere in the Kings River service area.

C.

The Statutes and Regulations

It would be inconsistent with reclamation law as developed by statute and regulation over nearly 75 years to now imply a "payout" exception to the requirement of section 46 of the 1926 Act.

It is important to define the issue clearly. The question presented in this case is whether, by payment of construction charges, the initial breakup of excess landholdings in single ownership can be avoided—in other words, whether owners of excess lands may, by paying construction costs, *retain* those lands and secure the right to the use of project water on them. The question is not whether a person who has disposed of his excess holdings, or irrevocably committed himself in a recordable contract to do so, may *thereafter acquire* additional project lands when construction costs allocated to his 160-acre tract have been paid and other conditions precedent to the full vesting of the right to receive project water for that tract have been satisfied.

The two questions are quite different. If payout could relieve owners of excess land of the obligation to contract to sell such land, the acreage limitation could be lifted even before it was implemented, and the social purposes of the limitation could be totally frustrated. However, once excess lands have been sold or

irrevocably committed to sale in tracts of no more than 160 acres at prices that do not reflect the existence of the project, the purposes of the acreage limitation have been realized to a substantial extent. An opportunity has been afforded for wide distribution of irrigation subsidy and windfall gain and for the establishment of family farms and small individual holdings. This will remain true even if individual owners thereafter expand their holdings beyond 160 acres by purchasing additional land with appurtenant fully vested water rights.

Moreover, when full payment has been made and a claim to use of project water on a 160-acre tract has ripened into a vested water right, another recognized policy of the law becomes relevant. It is an established principle of homestead law that "When the patent issued the full legal title passed to the patentee. He could do with the land that which he saw fit, sell or give it away . . . ." *Hartman v. Butterfield Lumber Co.*, 199 U.S. 335, 337 (1905). The same rule may govern a fully vested water right. Once complete legal title to such a right has been acquired, it can be argued that the right should be freely alienable; that no restraint should be imposed upon subsequent purchase or sale, including any limitation on the amount of land having appurtenant vested water rights that may be acquired.[108]

Whatever the merits of this proposition,[109] it is not the issue here. Our question is whether the *initial* breakup of excess holdings may be avoided by "payout."

With this distinction in mind, certain relevant conclusions may be drawn from the background of reclamation statutes and regulations in effect prior to passage of the 1926 Act. These will be summarized briefly in the paragraph that follows and discussed thereafter in greater detail.

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[108]This is the crux of the King Instructions, 43 I.D. 339 (1914), discussed below. *See* pages 62-63.

[109]Professor Paul Taylor has argued that the 160-acre limitation continues to apply as long as project water is furnished, even though full payment has been made. *See, e.g.*, P. Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 Yale L.J. 477, 481-501 (1955). Solicitor Barry, in his 1961 opinion, concluded that private holdings may be expanded beyond 160 acres after "payout" only if a general pattern of family-sized farms has been established on the project by that time, thereby fulfilling a central purpose of the acreage limitation. 68 I.D. at 405.

For the policy reasons stated earlier, Congress has consistently sought to limit initial holdings of public and private lands eligible to receive reclamation project water to 160 acres. Grants of public land were expressly so limited in the original Reclamation Act of 1902. In the 1902 Act, Congress sought to achieve the breakup of large holdings of private land by limiting water delivery to 160 acres. In administering this statute the Department of the Interior sought to secure commitments to sell excess lands prior to delivering water, and, in most cases, prior to undertaking construction of a project. Under the complex regulatory scheme adopted by the Department, it would have been impossible to avoid this initial breakup of excess holdings by paying construction costs. Building on this administrative practice, Congress included provisions in the Reclamation Extension Act of 1914 and later in section 46 of the 1926 Act expressly requiring owners of private land to agree to sell excess holdings. There is no provision in any of these statutes authorizing avoidance of acreage limitations by payment of construction costs. There is no mention of such a theory in the legislative history of any of these statutes. Each statute evinces a continuing purpose to limit initial private holdings to 160 acres and compel the redistribution of larger estates. In adopting the recordable contract requirement in section 46 of the 1926 Act, Congress intended to strengthen the excess land limitation, not to weaken it. Accordingly, it would be inconsistent with the statutory and regulatory antecedents of section 46, as well as the immediate legislative history of that section, to imply an option to purchase immunity from initial breakup by means of "payout."

(1) *1902 - 1912*

Congress effectively restricted the size of individual holdings of public land on reclamation projects by providing in sections 3 and 4 of the Reclamation Act of 1902 that homestead entries on such projects would be limited to a farm unit of from 40 to 160 acres as the Secretary might determine to be required to support a family.[110] Persons who entered a tract of 160 acres of project land under the homestead laws before the Secretary made this deter-

[110]Sections 3 and 4, Act of June 17, 1902, 32 Stat. 388, 389, 43 U.S.C. §§ 416, 419, 432, 434.

mination were required to relinquish or dispose of the portion of the original 160-acre entry in excess of one farm unit.[111]

Congress sought to limit private land holdings on reclamation projects to 160 acres and bring about the division and redistribution of larger tracts by providing in section 5 of the 1902 Act that project water should not be sold for a tract in excess of 160 acres to any one landowner.[112] Section 5 also required the owner of private land to reside on or in the neighborhood of the 160-acre tract receiving project water.[113] The purpose of these provisions, as the House Committee on Irrigation of Arid Lands explained, was to "compel the breaking up of any large tracts now held for which water rights from Government works are to be obtained by limiting the area of lands the property of any one landowner for which a water right may be required to 160 acres and requiring residence or occupancy of the land by the owner."[114]

The provisions of the 1902 Act imposing acreage limitations on public land entries in reclamation projects accomplished Congress'

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[111]Prior to 1910, excess public land returned to the government and was open to entry by others. 33 I.D. 158, 159-60 (1904); 38 I.D. 620, 634-35 (1910). In 1910 Congress provided that an entryman could assign his entry, in whole or in part, after making proof "of residence, improvement, and cultivation for the five years required by law." Act of June 23, 1910, ch. 357, 36 Stat. 592, 43 U.S.C. § 441. The purpose of the Act was "to enable entrymen whose entries were cut down in area by the Secretary of the Interior in prescribing farm units to dispose of their surplus to others who would be able to hold it, fulfill conditions and secure a patent, and avoid a relinquishment or cancellation of the surplus which had been the consequence before the act." Irwin v. Wright, 258 U.S. 219, 231-32 (1922).

[112]Section 5 reads in pertinent part:

> No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or an occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made.

32 Stat. 389, 43 U.S.C. § 431.

[113]The private landowner was also required by regulation to reclaim at least half of the irrigable land in his tract. 37 I.D. 468 (1909).

[114]H.R. Rep. No. 1468, 57th Cong., 1st Sess. 8 (1902). *See also* 35 Cong. Rec. 6677, 6678, 6680 (1902) (remarks of Rep. Mondell); U.S. Reclamation Service, 3d Annual Report 31 (1905), *quoted in* note 107.

purpose and remain the law today. Clearly these provisions cannot be avoided by paying irrigation construction charges. The legislative history of the 1902 Act establishes that Congress intended the limitations imposed upon owners of private land in reclamation projects to accomplish precisely the same purposes in essentially the same way as the limitation imposed upon public lands in such projects.[115] The reasons for rejecting a "payout" exception to these limitations with respect to public lands, rooted in the congressional purposes, apply equally to private lands.

For example, no one contends that an entryman has ever been permitted to obtain a patent from the United States for more than 160 acres of public land and a right to water to irrigate that land simply by paying the nominal fee for the land, satisfying residency and cultivation requirements, and repaying irrigation construction costs allocated to the larger tract. Yet appellees' payout principle would permit just such a circumvention of the quantitative limitation imposed upon water rights granted by the government to private landowners. We can think of no reason why the result should be different because the private owner obtains water rather than land, especially since the right to reclamation project water generally constitutes a much more substantial benefit than a patent to arid land.[116]

Nor does anyone suggest that if an entry on public land had been within the 160-acre limitation but exceeded the acreage later determined by the Secretary to constitute a farm unit capable of supporting a family, the entryman could have paid the construction charges on the entire entry and avoided the requirement that he relinquish or sell that portion in excess of a farm unit. The Department's regulations would have foreclosed such a possibil-

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[115] *See, e.g.*, H.R. Rep. No. 1468, 57th Cong., 1st Sess. 8 (1902); 35 Cong. Rec. 6673-74, 6677, 6678, 6758, 6759 (1902). The effect of the various limitations imposed upon owners of private land on reclamation projects was "virtually to require the private landowner to homestead a water right." B. P. King, The Excess Land Provisions of the Federal Reclamation Laws 58 (1941).

[116] *See* U.S. Dep't of Interior, Annual Reports, Admin. Reports, Vol. 1, p. 88 (1908); U.S. Dep't of Interior, Annual Reports 30 (1928); U.S. Reclamation Service, 11th Annual Report 7-8 (1912); U.S. Reclamation Service, 13th Annual Report 27 (1915). *See also* pages 47-48 & nn. 99, 104.

ity.[117] Again, the substantial reasons for denying public land entrymen the option to retain excess land and water by paying nominal land fees and the cost of constructing irrigation facilities also require denial to private landowners of the option to retain the right to receive project water for excess land.

Finally, the strength of the policy favoring distribution of reclamation benefits to actual settlers is reflected in the fact that entrymen on public land in reclamation projects have never been permitted to commute even the statutory residence and cultivation requirements by early payment, as other homestead entrymen do.[118] The stricter limitations imposed on entrymen on public lands in reclamation projects by the 1902 Act were intended "to prevent the possibility of speculative holdings or the accumulation of large tracts in single ownerships."[119] The same policy considerations argue against allowing private landowners to commute by early payment the requirement that they dispose of excess lands as a condition to receiving project water.

Steps taken by the Department of the Interior in administering the 1902 Act reflect the view that private lands on reclamation projects, like public lands, were to be made available for settlement in tracts of 160 acres or less, and that prepayment of construction costs would not have been an acceptable alternative to the accomplishment of this objective. The Department moved expeditiously to secure the initial breakup of excess private holdings. Retention of excess acreage and receipt of project water for

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[117]The regulations provided, "The entire building charge . . . may be paid at any time *after* the entry has been conformed to a farm unit. . . ." 38 I.D. 620, 633 (¶ 25) (1910); 40 I.D. 641, 662 (¶ 42) (1912) (emphasis added).

[118]Section 5 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C. § 439, required the entryman to reside on the land for five years and reclaim one half of the irrigable land on his entry before a patent would issue. The residency requirement was later reduced to three years. Act of June 6, 1912, ch. 153, 37 Stat. 123. Section 3 of the 1902 Act, 32 Stat. 388, 43 U.S.C. § 432, expressly provided that a public land entryman under the reclamation laws could not commute these residency and cultivation requirements by paying construction costs allocable to his land after 14 months' residence and cultivation, as an entryman under the homestead laws was permitted to do. *See* 43 U.S.C. § 173.

[119]H.R. Rep. No. 1468, 57th Cong., 1st Sess. 8 (1902). *See also* S. Rep. No. 254, 57th Cong., 1st Sess. 2 (1902).

that acreage after full payment of charges would have been incompatible with the means the Department adopted.

The feasibility of projects containing private lands often depended on bringing such lands under irrigation so that the costs of the project could be spread and the repayment obligation could be kept within practicable limits. Since under section 5 of the 1902 Act water could not be furnished to more than 160 acres in single ownership, it was necessary to insure, prior to construction, that large private holdings would be broken up and redistributed in tracts of this size.

The Department formed and utilized water users' associations to accomplish this purpose.[120] These associations became "an integral part of the project and directly associated with the Government in carrying out the details thereof,"[121] including acreage limitations.[122] The associations were required to enter into contracts with the United States guaranteeing repayment of each member's share of the project's construction charges,[123] and the government in turn promised to deliver water only to association members.[124] To bring about the redistribution of excess private holdings, the Department approved a form of agreement between the association and its members requiring the latter to sell holdings in excess of 160 acres or to execute a trust deed empowering the association or a designee of the Secretary of the Interior to sell them.[125] Since

[120]34 I.D. 544 (1906); 33 I.D. 202, 203-04 (1904); Hearings on H.R. 8836 and 9611 before the House Committee on Irrigation & Reclamation, 68th Cong., 1st Sess. 203 (1924); U.S. Reclamation Service, 3d Annual Report 54-56 (1905). *See also* Acreage Limitation Policy, *supra* note 9, at 11.

[121]34 I.D. 544 (1906).

[122]*See generally* King, *supra* note 115, at 28-41; U.S. Reclamation Service, 2d Annual Report 48 (1904).

[123]34 I.D. 544 (1906); U.S. Reclamation Service, 3d Annual Report 54-55 (1905); King, *supra* note 115, at 29. The Salt River Valley Water Users' Association was the first such organization, and later associations were patterned after it. Third Annual Report, *supra*, at 55. The contract between the United States and the Salt River Valley association, *id.* at 130-33, may therefore be regarded as typical.

[124]King, *supra* note 115, at 50. *See, e.g.*, Contract between the United States and the Salt River Valley Water Users' Association, *supra* note 123 at ¶ 2.

[125]33 I.D. 202 (1904); King, *supra* note 115, at 37-41; Acreage Limitation Policy, *supra* note 9, at 11.

these agreements were entered into before the project was built, as a means of insuring the project's feasibility,[126] they were executed before construction costs could be estimated, much less repaid.[127]

The effect of these agreements was reinforced by departmental regulations. The Department required the filing of a water right application as a condition to receiving project water. An application for more than 160 acres would not be accepted from any one person.[128] The limitation was absolute; there was no provision for an exception if construction charges were paid. Further, the applicant was required to belong to the water users' association,[129] which, as we have seen, would also require him to sell his excess land or execute a trust deed for its sale.[130] Thus, the tender of

[126]*See, e.g.,* In re Goshen Irrigation Dist., 42 Wyo. 229, 293 P. 373 (1930) (condition of commencing construction was execution of trust deeds to insure that 95%—later reduced to 90%—of private lands would be included in the project in tracts of 160 acres or less).

[127]Section 4 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C. § 461, required the Secretary to establish construction charges for individual tracts with a view of returning the entire estimated cost of construction to the reclamation fund. So that the calculation might be more accurate, charges were not to be assessed to individual water users until *after* the Secretary had entered into contracts for construction of the project. Yuma County Water Users' Ass'n v. Schlecht, 262 U.S. 138, 144 (1923).

[128]34 I.D. 544, 545 (1906); 40 I.D. 641, 667 (¶ 65) (1912); 45 I.D. 385, 404 (¶ 76), 407-08 (¶ 91), 409 (¶ 99) (1916). *See also* 43 C.F.R. §230.65. Moreover, the application form approved by the Secretary in 1911 provided that final evidence of ownership of a water right would be issued only to an applicant "whose aggregate water rights under the said Reclamation Act shall not exceed one hundred and sixty acres . . . at the time when final payment . . . is due." 39 I.D. 532, 534 (1911). A private landowner thus could not aggregate holdings in excess of 160 acres during the time between application and final payment.

[129]34 I.D. 544, 545 (1906); 38 I.D. 620, 640 (¶ 55e) (1910); 40 I.D. 641, 670 (¶ 77 I) (1912). *See also* 43 C.F.R. § 230.80 (1974).

[130]Construction might proceed though some private land was not covered by trust deeds. *See, e.g.,* In re Goshen Irrigation Dist., *supra* note 126. However, it would not have been possible for those few landowners who avoided executing trust deeds at the outset to later submit applications and receive water without first committing their excess lands to sale. To obtain water, owners of such lands had to become members of the water users' association (*see* notes 124 & 129 and accompanying text), and to become members of such associations they had to execute trust deeds for the sale of excess lands. King, *supra* note 115, at 37; Landownership Survey, *supra* note 92, at 34.

full payment, either at the time of application or at some later date, would have come too late to avoid the initial breakup of excess holdings.

At least as early as April of 1912, a water right application would not be accepted unless it included all the applicant's land.[131] This provision, coupled with the overall limit of 160 acres to an application, also had the effect of requiring the applicant to dispose of holdings in excess of 160 acres before he could apply for project water.[132]

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[131] 40 I.D. 641, 669 (¶ 76 III) (1912). *See also* 45 I.D. 385, 407 (¶ 91); 43 C.F.R. § 230.80 (1974).

[132] Acreage Limitation Policy, *supra* note 9, at 11-12; King, *supra* note 115, at 52.

The 1916 regulations made explicit the necessary consequences of these provisions: "Holders of more than 160 acres of irrigable land . . . must sell or dispose of all in excess of that area before water-right application will be accepted from such holders." 45 I.D. at 404 (¶ 76). This regulation, in similarly unqualified language, is still in effect. 43 C.F.R. § 230.65 (1974). The 1912 regulations were to the same effect, requiring holders of more than 160 acres of irrigable land to dispose of the excess before they could receive project water. 40 I.D. at 665 (¶ 54).

From an early date, the regulations also took cognizance of the prevalent trust deed practice and accepted it as an alternative to outright disposal of excess lands:

> If the holder of a greater area desires, he can subscribe for stock in the local water users' association (if there be one) for his entire holding, executing a trust deed, giving the association power to ultimately sell the excess area to actual settlers who are qualified to comply with the reclamation act, unless the land has been sold by the owner when the Government is ready to furnish water thereon.

40 I.D. at 665 (¶ 54) (1912). This same regulation was substantially repromulgated in 1916, 45 I.D. at 404 (¶ 76), and remains in effect today. 43 C.F.R. § 230.65 (1974). However, since water users' associations were not organized on new projects after about 1910 or 1912, King, *supra* note 115, at 33 n.9, the current regulations permit the owner of excess land, as an alternative to executing a trust deed empowering a water users' association to sell the land, to "provide for the disposal of such excess holdings in some manner approved by an authorized officer of the Department of the Interior." 43 C.F.R. § 230.65. The 1916 regulations contained a similar option. 45 I.D. at 404 (¶ 76).

The practice of requiring owners of over 160 acres of project land to execute trust deeds for the sale of excess holdings continued after water users' organizations were no longer organized. *See, e.g.*, In re Goshen Irrigation Dist., *supra* note 126. *See also* note 155. The recordable contract provision of § 46 of the 1926 Act, empowering the Secretary of the Interior to sell excess lands if the owner does not do so within

All of these regulations are still in effect.[133] Their language is as unqualified as that of the statutes they seek to implement. None accords any significance to the prepayment of construction charges.

(2) 1912 - 1914

Despite this elaborate system of controls through water users' associations, trust deeds, water rights applications, and administrative regulations, Congress was disappointed in its expectation that the provision of the 1902 Act for withholding project water from excess lands would lead to the prompt breakup of large tracts of private land. In 1914 Congress adopted a more direct and effective means to accomplish this objective.

Before turning to the 1914 Act, however, mention must be made of the Act of August 9, 1912,[134] for an inference drawn from a phrase in a proviso to a section of this Act was the principal basis for the Department's recognition of a "payout" exception to acreage limitation requirements for a period in the 1950's—indeed, as will be seen, it is the foundation upon which the entire "payout" argument ultimately rests.[135]

The 1912 Act was not directed to the acreage limitation problem. Its purpose was to enable entrymen and private landowners on reclamation projects to obtain title before final payment to use as security for loans needed to develop their farms.[136] To that end, section 1 of the 1912 Act provided that a patent to public land or a water right certificate for private land would issue upon proof of residence, reclamation, and cultivation, and payment of construction charge installments then due. Section 2 gave the United

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a stipulated period of time, *see* note 92, is remarkably similar to the trust deed device, King, *supra* note 115, at 40-41, and was no doubt patterned after it.

[133]Notes 128-29, 131-32. Water users have not been required to submit water right applications on projects constructed after 1926. Instead, the Department depends on irrigation districts to enforce the acreage limitations by withholding project water from excess lands for which recordable contracts have not been executed, as contemplated by § 46 of the 1926 Act. Acreage Limitation Policy, *supra* note 9, at 15-16; Landownership Survey, *supra* note 92, at 44-45.

[134]Ch. 278, 37 Stat. 265.

[135]2 Waters & Water Rights, *supra* note 71, § 120.10, at 226.

[136]S. Rep. No. 608, 62d Cong., 2d Sess. (1912).

States a lien for construction charges not yet due.[137] Section 3 provided that a certificate evidencing satisfaction of the lien was to issue upon full repayment of construction charges. The proviso in question then appears, reciting, in substance, that no person shall "acquire, own or hold" more than 160 acres of land "for which entry or water-right application shall have been made . . . *before* final payment in full of all installments of buildings and betterment charges shall have been made."[138] Proponents of the "payout" theory have inferred from the last quoted phrase that *after* construction charges have been paid the acreage limitation is no longer applicable, and, therefore, excess private holdings may be retained in the first place simply by paying construction costs.

The initial inference may be justified,[139] although it is irrelevant to this case. But the final conclusion is clearly wrong. The essential distinction is that drawn at the outset of this section between the unqualified obligation to comply with the acreage limitation as a condition to first securing a right to project water, and the ability to buy and sell a right to such water once that right has

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[137]Sections 1 and 2, 37 Stat. 265, 266, 43 U.S.C. §§ 541, 542.

[138]37 Stat. 266, 43 U.S.C. § 544 (emphasis added). The entire proviso of § 3 of the 1912 Act reads:

> *Provided* That no person shall at any one time or in any manner, except as hereinafter otherwise provided, acquire, own, or hold irrigable land for which entry or water-right application shall have been made under the said reclamation act of June seventeenth, nineteen hundred and two, and acts supplementary thereto and amendatory thereof, *before final payment in full of all installments of building and betterment charges shall have been made on account of such land in excess of one farm unit* as fixed by the Secretary of the Interior, as the limit of area per entry of public land or per single ownership of private land for which a water right may be purchased respectively, nor in any case in excess of one hundred and sixty acres, nor shall water be furnished under said acts nor a water right sold or recognized for such excess; but any such excess land acquired at any time in good faith by descent, by will, or by foreclosure of any lien may be held for two years and no longer after its acquisition; and every excess holding prohibited as aforesaid shall be forfeited to the United States by proceedings instituted by the Attorney General for that purpose in any court of competent jurisdiction; and this proviso shall be recited in every patent and water-right certificate issued by the United States under the provisions of this act. (emphasis added)

[139]*But see* note 109, and especially Taylor, 64 Yale L.J. at 487-501.

vested. Section 3 speaks only to the latter point; it does not purport to address the question of initial breakup of excess holdings.

On its face, the proviso contemplates that it will apply to private lands "for which . . . water right application shall have been made." As has been shown, under administrative practice and regulations in effect in 1912 an applicant was required to sell his excess lands or irrevocably commit them to sale before his water right application could be accepted. There is not a word in the legislative history of the 1912 Act intimating an intention to abrogate these regulations and administrative practices; the regulations were reissued in more explicit form in 1916, and, indeed, remain in effect today.[140] Thus, the proviso to section 3 applies by its terms only to a person who has never owned more than 160 acres or who had already reduced his holdings to that size by selling the excess or executing a trust deed for its sale. The proviso deals with the problem of subsequent acquisition of additional project land by such a person; it does not apply to the initial retention of excess lands.

Sections 1 and 2 of the 1912 Act advanced the time at which a patent or water right certificate could issue. Under principles of homestead law referred to earlier, this might also have advanced the time at which project lands and water rights could be purchased and sold free of acreage limitations.[141] The apparent purpose of the proviso to section 3 was to delay freedom to alienate and accumulate lands with vested project water rights until all construction charges had been repaid, even though a patent or water right certificate had issued.[142] This was the contemporaneous construction of the statute by the Secretary of the Interior, who, in recommending to the President that he sign the bill, stated that the purpose of the proviso was "to prevent the *consolidation* of holdings until such time as full and final payment of the building charges shall have been made."[143]

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[140] *See* notes 128-33, and accompanying text.

[141] *See* page 51.

[142] U.S. Dep't of the Interior, Excess Land Provisions of the Federal Reclamation Laws and the Payment of Charges, Part I, 14-15 (1956). *Cf.* 48 Cong. Rec. 9083 (1912) (remarks of Rep. Raker).

[143] Letter from Warren L. Fisher to the President, Aug. 6, 1912, at 4 (emphasis added). Secretary Fisher continued, "By that time it is believed that the land will be in the hands of permanent settlers and speculative holdings eliminated."

Interpretative instructions—commonly known as the King Instructions—issued two years later by Will R. King, Chief Counsel of the Reclamation Service, construed the proviso to section 3 in this same way.[144] The King Instructions treat the proviso as dealing only with the acquisition or purchase of project lands *after* the acquiring landowner has complied with acreage limitations and other conditions to obtaining a vested water right. Two previous departmental opinions had intimated that the proviso in section 3 of the 1912 Act limited to 160 acres the area for which a person could hold project water rights "even after he has discharged all his obligations to the Government, except for operation and maintenance" charges—i.e., that a project landowner was forever prohibited from expanding his holdings. Chief Counsel King read the proviso in light of the public land law principle supporting free alienability of rights that have vested "after having complied in full with the provisions of the law in order to acquire the title."[145] He concluded that additional lands could be acquired by a person holding a tract of 160 acres or less if he first paid all charges on his own tract or if the charges on the tract to be acquired had already been paid by the previous owner.

The King Instructions did not address the question of initial compliance with acreage limitations. Such compliance necessarily preceded any possible application of the King Instructions. In order to have "discharged all his obligations to the Government" or to have "complied in full with the provisions of the law in order to acquire" a project water right and thereby invoke the public law principle of free alienability relied upon by the Chief Counsel, the purchasing and selling landowners would first have had to reduce their holdings to 160 acres as required by the regulations then in effect. Thus, the King Instructions, like the proviso to section 3 of the 1912 Act they construed, are relevant only to the

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[144] 43 I.D. 339 (1914).

[145] The entire passage, in which the Chief Counsel expresses disapproval of a perpetual acreage limitation, reads:

> Such a limitation is a radical departure from all the public land laws, as apparently there never has been any intent by Congress to limit the amount of land which a man may own *after having complied in full with the provisions of the law in order to acquire the title,* and as the water right becomes on final payment an appurtenance to the land the same rule governs.

Id. at 340 (emphasis added).

subsequent acquisition of additional lands by persons who have never owned more than 160 acres of project land or have already reduced their holdings to that figure, or agreed to do so, in order to come into initial compliance with the acreage limitations.[146] Excess landowners in the Kings River service area do not fall into any of these categories.

If there could be any lingering doubt, the Reclamation Extension Act of 1914[147] made it absolutely clear that no inference of congressional approval of a "payout" theory based on the 1912 Act could possibly apply to the purchase of immunity from the requirement that initial excess holdings of private lands must be broken up as a condition to receiving project water.

For a variety of reasons, the Department's regulatory scheme to implement the mandate of section 5 of the 1902 Act was not as effectively enforced as it might have been. Large tracts of private land remained in single ownership in reclamation projects.[148] Moreover, lands sold pursuant to the trust deeds or directly by the original owners often commanded extraordinary prices from the actual settler, bestowing a windfall profit on the original owner and imposing an added burden on the settler.

Section 12 of the 1914 Act was designed to eliminate these problems on future projects. This provision gave the force of positive statutory law to the requirement that private landowners must agree at the outset to dispose of their excess holdings as a condition to receiving project water. Also, for the first time, it imposed

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[146]The current regulations embody the holding of the King Instructions in the words: "The Secretary has decided that the area which may be held by any one landowner after the construction charges have been fully paid may exceed 160 acres." 43 C.F.R. § 230.65 (1974). Obviously, this sentence does not permit a landowner to hold more than 160 acres *before* construction charges are paid in full. The quoted passage is included in the same regulation that provides that "[h]olders of more than 160 acres of irrigable land . . . must sell or dispose of all in excess of that area before water-right application will be accepted from such holders." *See* note 132.

[147]Act of Aug. 3, 1914, ch. 247, 38 Stat. 686.

[148]*See generally* Acreage Limitation Policy, *supra* note 9, at 6; King, *supra* note 115, at 97; Hearings on H.R. 13921 before the House Committee on Irrigation of Arid Lands (Part I), 63d Cong., 2d Sess. 22 (1914). U.S. Reclamation Service, 14th Annual Report 5-6 (1915).

controls on the price at which excess lands could be sold. Section 12 reads as follows:

> That before any contract is let or work begun for the construction of any reclamation project hereafter adopted the Secretary of the Interior shall require the owners of private lands thereunder to agree to dispose of all lands in excess of the area which he shall deem sufficient for the support of a family upon the land in question, upon such terms and at not to exceed such price as the Secretary of the Interior may designate; and if any landowner shall refuse to agree to the requirements fixed by the Secretary of the Interior, his land shall not be included within the projects if adopted for construction.[149]

It is patent on the face of this provision that Congress did not intend to permit private landowners to avoid the necessity of agreeing to sell their excess land by prepaying construction charges. The section required landowners to agree to sell excess lands "*before* any contract [was] let or work begun for the construction" of the project. Under section 4 of the 1902 Act, the Department could not compute estimated costs of construction until *after* contracts had been let.[150] Indeed, Congress had been advised that because final costs of construction so often exceeded original estimates, it was the Department's policy not to announce construction charges until a reclamation project was *completed*.[151] Payout of construction charges at either time would have come too late

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[149] 38 Stat. 689, 43 U.S.C. § 418. The report of the House committee stated:

> Another very important provision of the bill preventing speculation may be found in section 12, which provides that before the Secretary of the Interior shall hereafter undertake any new project he shall require the owner of private lands thereunder to dispose of all his lands in excess of the area deemed sufficient to support a family, upon such terms and at such price as the Secretary of the Interior may designate. If this provision shall be adopted speculation in lands under reclamation projects will be reduced to a minimum, and the burdens of the real farmer who undertakes to reclaim and cultivate the lands, and for whose benefit the reclamation law was enacted primarily, can be kept normal.

H.R. Rep. No. 350, 63d Cong., 2d Sess. 3 (1914).

[150] *See* note 127.

[151] Hearings on H.R. 13921, *supra* note 148, at 13.

to avoid the requirement that the owner of excess land agree to sell the excess at prices fixed by the Secretary.

To have permitted owners of excess land to avoid the requirements of section 12 by "payout" would also have been contrary to the repeatedly stated congressional purpose to break up and redistribute large private landholdings at nonspeculative prices.[152]

In contrast, there is nothing to support the notion that the breakup of excess holdings at nonspeculative prices under section 12 of the 1914 Act could be avoided by paying construction costs, either in the legislative history[153] or in any other provision of the 1914 Act.[154] Moreover, as noted earlier, the pre-1914 regulatory

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[152]*See, e.g.*, 51 Cong. Rec. 5028, 12225, 12232, 12241, 12952, 13362 (1914). It is a fair conclusion from the legislative history that "Section 12 of the 1914 act was designed specifically to cope with the special problem of *initially breaking up these excess holdings* and preventing the owners from capitalizing on the benefits of Federal construction in the form of high prices charged to purchasers of their lands." Acreage Limitation Policy, *supra* note 9, at 7 (emphasis added). *See also* 2 Waters & Water Rights, *supra* note 71, § 120.1, at 211-12. Payout would of course negate both of these essential purposes.

[153]As Solicitor Barry stated, "The legislative history of the Extension Act of 1914 is devoid of even the remotest suggestion that the restriction of Section 12 could be lifted or its purpose frustrated by immediate or early payout." 68 I.D. at 388.

[154]Section 1 of the 1914 Act provides that the landowner or entryman must pay 5% of the construction charges fixed for his land "at the time of making water-right application or entry, as the case may be," and that he must pay the balance in 15 annual installments beginning five years later. The section further provides that "any water-right applicant or entryman may, if he so elects, pay the whole or any part of the construction charges owing by him within any shorter period." 38 Stat. 686, 43 U.S.C. § 471. It has been argued that the option of lump sum payment implies an option to avoid the sale of excess holdings. But the lump sum payment option is offered to public land entrymen as well as to owners of private lands, and no one contends that prepayment would permit an entryman to retain excess public land. *See* pages 54-55. Moreover, as pointed out in the text, the obligation imposed by § 12 of the 1914 Act to agree to sell excess land arose before construction began or was contracted for, and therefore before construction charges could be repaid. *See* text at notes 149-51. Section 1 itself provides that the initial payment is to be made when the charge per acre is established.

There is no legislative history to explain the purpose of the lump sum provision, but in some circumstances lump sum "payout" might be desirable even though it did not avoid the requirement that large holdings

scheme, incompatible with an option to retain excess acreage by paying construction charges, remained in effect after the passage of the 1914 Act.[155]

(3) *1914 - 1926*

Section 46 of the 1926 Act was derived from section 12 of the 1914 Act.[156] It was designed to achieve the antimonopoly and

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be divided in the first instance. Under the King Instructions, it would have permitted the owner either to dispose of his land more readily or acquire additional acreage.

Section 13 of the 1914 Act closes with the proviso "[t]hat no person shall hold by assignment more than one farm unit *prior to final payment of all charges* for all of the land held by him subject to the reclamation law . . . ." 38 Stat. 690, 43 U.S.C. § 443 (emphasis added). This proviso cannot be used to support a "payout" exception to the requirement that excess private land be disposed of. In the first place, § 13 as a whole applies only to "entries under reclamation projects," 38 Stat. 690, 43 U.S.C. § 435, that is, to *public* land; and of course the proviso does not imply that excess public lands might be retained by paying construction charges. *See* pages 54-55. In the second place, this proviso, like the proviso in § 3 of the 1912 Act, relates only to obtaining lands "by assignment," that is, to the acquisition of additional lands, and not to retention of excess lands held at the outset. *See* pages 59-61; Barry Opinion, 68 I.D. at 386 n.35.

[155] *See* notes 128-33 and related text.

In implementing the 1914 Act, the Department required owners of excess land to convey that excess to a trustee, who would undertake to convey the land to a person designated by the original owner at a price approved by the Secretary. If the original owner did not arrange for the sale within a given period of time after public notice was given that water was available, the trustee was empowered to sell the land. *See, e.g.,* In re Goshen Irrigation Dist., *supra* note 126. *See also* Acreage Limitation Policy, *supra* note 9, at 17; King, *supra* note 115, at 102. Conveyance to the trustee occurred before construction began, but under § 1 of the 1914 Act, landowners did not submit water right applications and pay construction charges until after water was available from the project. 38 Stat. 686, 43 U.S.C. §§ 471, 472. Full repayment of construction charges would have come too late to avoid the trustee arrangement, just as it would have when a water users' association was designated as the trustee. *See* pages 56-57.

[156] Hearings on H.R. 8836 and H.R. 9611, *supra* note 120, at 350-51. Barry Opinion, 68 I.D. at 393 n.59. As the Department reported to Congress after a re-examination of the legislative history and antecedents of § 46 of the 1926 Act: "It is readily observable that the genesis of section 46 [of the 1926 Act] is to be found in section 12 of the 1914

antispeculation policies of the earlier statute more effectively by closing loopholes disclosed by the 1924 report of a special committee appointed by the Secretary of the Interior known as the Fact Finders.[157] It is evident from the Fact Finders' report, relevant congressional proceedings, and the provisions of section 46 that Congress intended to continue its policy of securing the initial breakup of excess holdings of private land and did not intend to allow this objective to be frustrated at the option of owners of excess land.

The Fact Finders' report emphasized that the central purposes of the reclamation law were to encourage family farms, distribute the reclamation subsidy widely, and avoid speculation. It pointed out that large tracts of private land remained in private ownership and that speculation had not been eliminated; it noted that the reclamation law had been amended to require holders of excess lands to sell their surplus, but that the law had not fully accomplished its antimonopoly and antispeculation purposes.[158]

To meet these problems the report recommended "[t]hat no reclamation project should hereafter be authorized until all privately owned land in excess of a single homestead unit for each owner shall have been acquired by the United States *or* by contract placed under control of the Bureau of Reclamation for subdivision and sale to settlers at a price approved by the Secretary."[159] A draft of proposed legislation attached to the report provided that

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act which had attempted to effect the sale of excess lands but had . . . failed for a number of reasons. . . . Thus there can be no question that the requirement of section 46 that the excess landowner contractually agree to the disposition of excess lands as a condition to receiving project water for such excess lands was deliberately enacted by the Congress in further pursuance of its policy designed to secure the breakup of preexisting excess holdings benefiting from the expenditure of Federal funds, and to prevent the owners of such holdings from reaping unearned profit at the expense of purchasers. It is this congressionally expressed policy, as enacted into law in section 46 of the 1926 Act, which today provides the basis for administration of the acreage limitation provisions of reclamation law." Acreage Limitation Policy, *supra* note 9, at 8. *See also* King, *supra* note 115, at 128.

[157] Federal Reclamation by Irrigation, S. Doc. No. 92, 68th Cong., 1st Sess. (1924).

[158] *Id.* at 36-39, 114, 133-34.

[159] *Id.* at 4 (emphasis added). *See also id.* at 124.

as a general rule excess lands should be acquired by the United States and should then be made subject to disposition under the reclamation laws in the same manner as other public lands. The draft legislation provided that the alternative of requiring contracts to sell at prices approved by the Secretary—the model for the recordable contract requirement in section 46 of the 1926 Act—was to be utilized in connection with the large tracts held by federal land grantees, such as railroads.[160] It was thought that intermediate acquisition by the United States of such large holdings would cause an unacceptable drain on the reclamation fund.[161]

Both alternatives proposed by the Fact Finders were incompatible with a "payout" theory. It could not have been thought that by paying construction charges after the project had been completed and those charges had been determined, the original owner of excess lands could compel the government to terminate the interest of any intervening settler on the excess land and relinquish the government's fee title to such land, or surrender the government's vested contract right to sell the excess land of federal grantees at prices fixed by the Secretary.

The differences between section 46 of the 1926 Act and the recommendations of the Fact Finders are minor. They reflect no weakening of the congressional will to require the breakup of excess holdings, and no approval of avoidance by payout.

As finally passed, section 46 adopted the Fact Finders' alternative of requiring owners of excess land to contract to sell such land at prices fixed by the Secretary and extended this procedure to *all* owners of excess land, rather than confining it to federal grantees. The Fact Finders' report does not suggest that this alternative was to be any less absolute than the alternative of outright acquisition by the United States. The reason for the choice was concern that acquisition by the United States would prove costly and productive of delay no matter who owned the excess land.[162] The congressional committee was told that any alternative that would assure sale of excess lands directly to actual settlers at nonspeculative prices would serve Congress' purposes just as well.[163] The committee was

[160] *Id.* at 204, 205.

[161] Hearings on H.R. 8836 and H.R. 9611, *supra* note 120, at 52.

[162] *Id.* at 46-49, 323-30.

[163] *Id.* at 49.

advised, in effect, that the alternatives of intermediate acquisition by the United States and direct sale to actual settlers pursuant to a contract placed under the control of the Department were equivalents,[164] and proceeded on that assumption.[165]

Under the Fact Finders' proposal, construction could not have begun until all owners of excess lands transferred such land to the United States or contracted to sell it at government-fixed prices, just as under section 12 of the 1914 Act. As we have shown, subsequent "payout" could not have avoided disposal. Section 46 as passed allows construction to proceed, but bars delivery of project water to excess land until a recordable contract for its sale is executed. The reasons for the change are clear, and reflect no diminution of Congress' determination to break up excess landholdings. In the course of committee hearings, it was pointed out that under the Fact Finders' proposals, construction of a project might be prevented or delayed if even one owner refused to transfer or contract to sell excess land;[166] Congress obviously thought it necessary to avoid such an impasse.[167] In addition, Congress thought it would be difficult to negotiate contracts requiring sale of excess holdings at nonspeculative prices until the government evidenced its good faith by affirmative action. Congress was assured that its purpose would be achieved as readily by conditioning the delivery of water, rather than the commencement of construction, upon the execution of the desired contracts.[168]

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[164] *Id.* at 323.

[165] *Id.* at 325-26, 329-30, 345.

[166] *Id.* at 46-49, 327.

[167] In administering the 1926 Act the Department of the Interior has required, to the extent practicable short of impasse, that individual commitments to sell be obtained before construction is begun. The Bureau has stated that the "[a]dministration under section 46 may be illustrated by the procedure followed in the case of the Vale project." Landownership Survey, *supra* note 92, at 46. That project is described in more detail in King, *supra* note 115, at 129-33. In the Vale project, it was made a prerequisite to construction that individual contracts to sell be executed with the United States covering 75% of the excess lands. On certain other projects, individual contracts to sell excess lands were secured during construction or just before water was ready for delivery.

[168] A similar change was made in the time at which a joint liability repayment contract must be executed with the irrigation district. It was originally provided that this contract must be executed before construction commenced. The Senate Committee on Irrigation and Reclama-

Thus, neither respect in which section 46 of the 1926 Act differs from the Fact Finders' recommendations reflects a purpose to soften the impact of acreage limitations.

Section 46 was adopted to meet two problems that had developed in the administration of the 1914 Act.[169] Ironically, the

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tion recommended that the provision be changed to require execution of the contract before project water was delivered to the district, and represented that the change would not diminish the effectiveness of the provision:

> 8. On page 33, lines 11, 12, and 13, strike out the following words, "No part of any sum hereafter appropriated for any new project or new division of a project shall be expended for construction purposes," and insert in lieu thereof the following: "No water shall be delivered upon the completion of any new project or division of a project." This section, as approved by the House, would prevent appropriations by Congress for new projects or new divisions until proper contracts had been made by the United States with an irrigation district or irrigation districts. It is thought, however, that contracts could not be successfully negotiated until after some action involving an appropriation had been taken by the Federal Government, *and that the language recommended by your committee will amply protect the United States in the desired manner.*

S. Rep. No. 831, 69th Cong., 1st Sess. 3 (1926) (emphasis added).

[169]The first problem was that control of the terms of the initial sale of excess lands did not prevent introduction of a middleman who could turn a rapid and substantial profit and resell to a settler at a burdensome price. U.S. Reclamation Service, 14th Annual Report 6 (1915). The second problem arose out of the fact that § 11 of the 1914 Act, 38 Stat. 689, 43 U.S.C. § 465, was interpreted to permit project water to be furnished to excess lands until the Department gave official public notice of the construction charges allocated to each tract. Trust deeds normally did not require that excess lands be sold until this notice was given. The notice was often delayed, excess lands were supplied with water for a considerable period of time, and the redistribution of such lands was delayed indefinitely. *See* Landownership Survey, *supra* note 92, at 42.

Section 46 of the 1926 Act attacked both problems. The problem of uncontrolled sales by middlemen was minimized by imposing controls on at least some subsequent sales of excess lands, *see* text at notes 170-72; the problem of indefinite delay in sale of excess lands under trust deeds was addressed by the provision that no project water was to be delivered until a repayment contract embodying the recordable contract requirements had been executed by the irrigation district. *See* note 94.

In addition to closing specific loopholes in the 1914 Act, § 46 of the

means adopted by Congress to close one of the loopholes in the 1914 Act is seized upon to support the theory that acreage and price controls may be avoided completely by "payout." It is argued that the clause following the recordable contract provision in section 46[170] permits an owner of excess land to free himself of the requirement that the Secretary approve the price at which such lands are sold by paying half of the construction charges attrib-

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1926 Act strengthened the Secretary's hand in other ways. The Secretary was directed to require a "recordable contract" to dispose of excess lands rather than the generalized agreement authorized by the 1914 Act. The Secretary was required to contract with irrigation districts rather than individual water users for repayment of construction charges. The irrigation districts could assess owners of excess lands for the district's repayment obligation under the joint liability contract even though those lands were denied water, thus providing a powerful economic incentive to execute contracts for the sale of excess lands. *See, e.g.,* Shoshone Irrigation Dist. v. Lincoln Land Co., 51 F.2d 128, 129 (D. Wyo. 1930); Nampa & Meridian Irrigation Dist. v. Petrie, 28 Idaho 227, 236-37, 153 P. 425, 429-30 (1915); Klamath County v. Colonial Realty Co., 139 Ore. 311, 317-18, 7 P.2d 976, 978-79 (1932); In re Goshen Irrigation Dist., 42 Wyo. 229, 293 P. 373, 378-79 (1930). *See* Landownership Survey, *supra* note 92, at 44-45; King, *supra* note 115, at 116-21.

In 1922, Congress first *authorized* the Secretary to contract with irrigation districts and to release government liens in prior water right applications covering land that was brought into a contracting irrigation district. Act of May 15, 1922, ch. 190, 42 Stat. 541. One inducement for passing the act was the belief that assessment by the irrigation district would lead to the breakup of excess holdings. 62 Cong. Rec. 3588 (1922); Landownership Survey, *supra,* at 43.

[170]The two concluding clauses of § 46 are repeated below for convenient reference:

> that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; and that until one-half the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior and that upon proof of fraudulent representation as to the true consideration involved in such sales the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sales . . . .

44 Stat. 649-50, *as amended* 43 U.S.C. § 423e.

utable to them, and thereby recognizes at least a partial "payout" theory. This is a patent misconstruction of the meaning and purpose of the clause in question. Its purpose and effect was to strengthen the Secretary's hand in dealing with speculative sales, not to weaken it by permitting avoidance of price controls by partial "payout."

The portion of section 46 preceding the clause in question restates the absolute requirement, drawn from the 1914 Act, that to obtain project water, initial owners of excess land must agree to sell such land at prices fixed by the Secretary. The purpose of this provision, as we have seen, is to compel the initial sale of excess lands at prices excluding enhancement from the presence of the project. The 1914 Act did not, however, give the Secretary authority to control the price at which the excess lands were thereafter resold by the purchaser. As a consequence, the landowners avoided the price limitation on the sale of excess lands by selling such lands to middlemen who then resold them at unregulated prices, often on the original owner's behalf.[171] The clause in question was included in section 46 to meet this problem, at least in part, by enabling the Secretary to control the price at which some resales were made.[172]

The construction of the clause suggested by "payout" proponents would permit the owner of excess land to sell that land at speculative prices by paying half the construction costs. In many if not most instances, as we have seen, owners of land would exercise this option, even at twice the price. Thus the construction suggested by appellees, though not affecting the requirement that excess land be sold, would effectively negate the bar against sale of excess land at speculative prices. Why Congress would wish such a result

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[171] *See* note 169. *See also* King, *supra* note 115, at 102-03 & n.46; Hearings on H.R. 8836 and H.R. 9611, *supra* note 120, at 49.

[172] The clause is described as applying to "subsequent" sales in King, *supra* note 115, at 129. *See also* Landownership Survey, *supra* note 92, at 46; Sax, *supra* note 71, at 20-28.

By imposing restrictions on subsequent sales of excess land only until one half of the construction charges had been repaid, Congress reached an accommodation between competing policies of eliminating the middleman and allowing the purchasing settler to alienate his land freely and realize some of its enhanced value, which might be attributable in part to the settler's efforts in reclaiming the land and preparing it for cultivation.

is not suggested. It would conflict directly with Congress' intent to place *additional* curbs on speculation and windfall gain. When the clause in question is confined to sales subsequent to the initial sale of excess lands, as intended, it does not embody a partial "payout" principle as appellees argue.

In sum, the historical background of section 46 of the 1926 Act leaves no room for an implied option to avoid initial breakup of excess landholdings by paying construction costs. Admittedly, no such option is available as to public lands, and the same purposes were intended to be served by the application of the acreage limitation to private lands. The regulations formulated by the Department of the Interior before 1926 contemplated the initial breakup of excess private holdings, and were incompatible with avoidance of that requirement by a "payout" of construction costs. The Act of 1912 is not to the contrary; it is concerned with acquisitions after rights have vested, not with the breaking up of initial holdings—a condition to the vesting of rights in the first instance. The Act of 1914 in effect adopted the procedure reflected in the Department's administrative practices and regulations. On its face, the 1914 Act is inconsistent with the notion that initial breakup of excess lands could be avoided by paying construction costs. Section 46 of the 1926 Act is based upon the 1914 Act. The 1926 Act was intended to make the acreage limitation and antispeculative provisions more effective, not less. The Fact Finders' report and relevant legislative hearings reflect that the means adopted in section 46 was considered to be equivalent, for these purposes, of outright acquisition of excess lands by the government at the outset—an arrangement that would have made avoidance by "payout" impossible.

D.

Administrative Interpretation

It is argued, however, that the conduct of the Department of the Interior in administering the statute indicates that the Department inferred an exception to section 46 if construction costs were paid. Except for a relatively brief period in the 1950's, the administrative interpretation is either inferentially or expressly to the contrary.

As has been shown, the regulations adopted before 1926 were premised upon initial breakup of excess holdings and were incom-

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patible with avoidance of that requirement by paying construction charges. This is not to imply that the regulations were deliberately designed to this end. The suggestion that disposition of initial excess acreage could be avoided by paying construction charges does not appear to have occurred either to Congress or to the Department of the Interior during this period. There is no evidence of a single instance between 1902 and 1926 in which the Department agreed that repayment of construction charges would permit the original owner of excess lands to receive project water for such lands without first selling or agreeing to sell them.[173]

From 1926 to the middle 1940's the case for administrative recognition of a payout exception to section 46 rests primarily upon passages culled from less than a score of letters and internal memoranda prepared in the course of over 15 years of the Department's daily operations. This material was selected from the Department's files in 1955 in response to a congressional inquiry into the legitimacy of a proposed "payout" option in contracts affecting owners of excess lands in the Kings River project. The showing is hardly impressive. The volume of material is strikingly meager for

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[173]Appellees find support for pre-1926 recognition of their "payout" theory in the King Instructions issued July 1, 1914, and in four letters written by Interior Department officials to water users over a four-year period from 1919 to 1924.

As we have seen, the King Instructions were concerned with purchase, sale, and consolidation of vested water rights, not with avoidance of the initial breakup of excess holdings. *See* notes 144-46 and related text.

Three of the four letters relied upon were addressed to the Salt River Valley Water Users' Association. *See* 1956 Study, *supra* note 142, Part I, Exhs. 4, 5, & 7. This was one of the first associations to use trust deeds to secure the breakup of excess holdings. The Department had approved the use of the trust deed procedure by this association some 15 years before the earliest of these letters was written. 33 I.D. 202 (1904). *See* notes 123-24. In all probability, therefore, the initial breakup of excess holdings had been accomplished, and the letters referred to the inapplicability of acreage limitations to the subsequent alienation and consolidation of rights that had vested by payment of construction charges. The two more detailed letters specifically rely upon § 3 of the 1912 Act and the King Instructions. Exhs. 5, 7.

The fourth letter is a notice mailed to the water users on the Yuma project in Arizona on July 27, 1924, 1956 Study, *supra*, Part I, Exh. 8. It expressly informed landowners that an application for project water would be accepted only from an individual "who, at the time of making the application, can show that he has the record title to the land not exceeding 160 irrigable acres . . . ."

so extensive a program. More important, nearly all of the material in the collection appears on its face to be irrelevant to appellees' "payout" theory. Almost all of the excerpts are generalized statements derived from section 3 of the 1912 Act and the King Instructions. They do not concern the initial breakup of excess holdings, but the subsequent purchase, sale, or consolidation of vested rights by water users who had already reduced their holdings to 160 acres or committed themselves to do so.[174]

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[174] Appellees rely upon four documents in particular from this 15-year span: a letter written in 1928 to the president of an irrigation district by Commissioner of Reclamation Elwood Mead, a letter written in 1930 by Secretary of the Interior Ray Lyman Wilbur to an insurance company that had foreclosed on mortgages and obtained more than 160 acres of project land, and two notices sent in October 1939 to Yakima and Boise project water users.

The Mead letter (Letter from Elwood Mead, Commissioner of Reclamation, to C. C. Lewis, President, Enterprise Irrigation Dist., Jan. 27, 1928, 1956 Study, *supra* note 142, Part I, Exh. 20) was written in response to suggestions that Congress be asked to enact clarifying legislation to aid in the disposition of pending litigation involving the Klamath project. *See* Letter from J. H. Carnahan to R. J. Coffey, District Counsel, Reclamation Service, Dec. 8, 1927, *id.*, Exh. 18; Memorandum from District Counsel Richard J. Coffey to the Commissioner of Reclamation, Dec. 10, 1927, *id.*, Exh. 17. The inquiry and response are business letters, not legal documents. Understandably, the language is general and lacking in precision. Nonetheless, it is clear from the background of the litigation that neither the inquiry nor the response was concerned with the initial breakup of excess project lands.

One landowner involved in the litigation had 160 acres under irrigation in the Klamath project and excess acreage in the Enterprise Irrigation District, which was outside the Klamath project. The Enterprise Irrigation District received surplus project water under the Warren Act, Act of Feb. 21, 1911, ch. 141, 36 Stat. 925, 43 U.S.C. §§ 423-25. *See* Enterprise Irrigation Dist. v. Enterprise Land & Inv. Co., 137 Ore. 468, 300 P. 507 (1931); U.S. Bureau of Reclamation, Reclamation Repayments & Payout Schedules 166 (1965). Since the Department's regulations directed as initial breakup were applicable only to *project* land (40 I.D. 641, 665 (¶ 54), 669 (¶ 76) (1912); 45 I.D. 385, 404 (¶ 76), 407 (¶ 91), 409 (¶ 99) (1916)), it was not necessary for the landowner to dispose of the lands in the Enterprise Irrigation District to make application for water for the 160 acres in the Klamath project, even assuming the landowner owned both pieces of land when the application was submitted. Thus, no question of initial breakup was presented.

The other property involved in the Klamath litigation was within the project boundaries, but the landowner in question was not the original owner. The landowner had *acquired* its more than 700 acres long after

Since the middle of 1940's, the history of the acreage limitation has been to a large extent a reflection of the unsuccessful struggle of owners of large tracts of land in California, including the Kings River area, "to obtain the Federal irrigation investment without accepting the acreage limitations."[175]

An effort to obtain legislative exemption from acreage limitations of the Central Valley project was defeated in 1944.[176] In the same year landowners in the Kings River service area, especially those in the Tulare Lake Basin, also sought a legislative exemption from acreage limitations for the Kings River project and other nearby projects during consideration of the Flood Control Act. Appellees argue here that the Flood Control Act did in fact include both a total exemption *and* a "payout" option. The reasons for rejecting the argument that Congress granted landowners on the

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the particular section of the Klamath project had been developed, from persons who presumably had complied with the Department's regulations and the association's trust deed procedures for disposing of excess land. Klamath County v. Colonial Realty Co., 139 Ore. 311, 313, 7 P. 2d 976, 977 (1932). Again, no question of initial breakup was involved.

The second piece of correspondence relied upon by appellees, a letter from Ray Lyman Wilbur, Secretary of the Interior, to Edw. O. Clark, Associate General Solicitor, Prudential Insurance Co., Feb. 27, 1930, 1956 Study, *supra*, Part I, Exh. 9, involves only subsequently acquired lands.

The notice to the water users on the Boise and Yakima projects does not support appellees' "payout" theory. The first portion of the notice informs landowners in unqualified language that they must execute recordable contracts for the sale of excess lands to receive project water for those lands. The second portion informs landowners that before water is furnished each year they will be required to satisfy the Bureau that they own no more than 160 acres on which construction charges have not been paid. The obvious purpose of this portion of the notice was to insure that landowners who had complied with initial breakup requirements had not *acquired* any nonqualifying land during the preceding year. *See* Landownership Survey, *supra* note 92, at 47. There is no suggestion that by paying construction charges persons who initially held more than 160 acres could avoid the recordable contract provision stated in the preceding portion of the notice.

[175]Hogan, *supra* note 81, at 108.

[176]The defeated proposal was a rider to the Rivers & Harbors Bill, H.R. 3961, 78th Cong., 2d Sess. (1944), proposed by Congressman Elliott of California. *See Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. at 292-93.

Kings River project a total exemption in the Flood Control Act were set out in Part I of this opinion. The fallacies in the somewhat inconsistent argument that Congress in the same statute also authorized the landowners to escape section 46 of the 1926 Act by "payout" are summarized in the margin.[177] In 1947 a proposal to

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[177] Appellees argue that two passages in the testimony of witnesses from the Department of the Interior before congressional committees reflect the view that acreage limitations would not survive "payout" of construction charges.

The first is an answer given by Commissioner Bashore to a question put to him in the House hearings by Representative Curtis. Commissioner Bashore was asked if the Bureau wanted "the distributing system to have jurisdiction" over irrigation water "until the Federal Government" is paid. Commissioner Bashore answered, "Yes, sir." 1944 House Hearings, *supra* note 13, at 646. Whatever this passage may mean, it is clear from the context that it cannot be read as an endorsement of the position that landowners should be granted an option to avoid the initial breakup of excess holdings. Immediately before this exchange Commissioner Bashore had argued that removal of the 160-acre limitation "would permit speculation in lands where the owners are recipients of Government benefits." *Id.* at 643. He continued:

> We are concerned with the little people, Mr. Elliott, in the Western States of the United States. We are charged with the responsibility of making homes for more of the soldiers coming back from the war. We want as many farms as possible for those little people, and we do not want to eliminate all control over the size of holdings of all lands owned by people that come to the Federal Government to get money to provide supplemental works to perfect their water rights.

Id.

The second bit of testimony relied upon by appellees was not given at hearings concerned with the Flood Control Act of 1944, but in Senate hearings on the Elliott Rider, later defeated, that would have exempted the Central Valley project from the acreage limitations. *See* note 176. In any event, it does not support appellees' "payout" theory. Assistant Commissioner of Reclamation William E. Warne was told "That a farm boy should have the right . . . *to acquire* more than 160 acres if his efforts justify it . . .;" and was accused of "denying them the right to be anything except 160-acre farmers." Mr. Warne responded, "I think you misconstrue this, because nowhere does this limitation apply after the project is paid for, and in most instances it is after the project is half paid for." Another witness rejoined, "Well, that, of course, for your time and mine, is entirely meaningless. *That means 40 years, . . .*" (emphasis added). Hearings on H.R. 3961 before a Subcommittee of the Senate Commerce Committee, 78th Cong., 2d Sess. 702-03 (1944). Obviously this exchange related to the ability of a landowner to *expand* his holdings after charges had been paid, the problem dealt with in

exempt projects in California, Colorado, and Texas died in com-

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the King Instructions. It had nothing to do with avoiding, by "payout," the requirement that excess holdings be broken up at the outset.

Appellees cite nothing further from the legislative history of the 1944 Act in support of their argument that Congress recognized and approved the "payout" theory. We have found nothing.

It is unlikely that application of acreage limitations to the Kings River project and other projects nearby would have generated the controversy it did if the limitation could have been so readily avoided. It is even less likely that such an option would have gone unmentioned in the hundreds of pages of committee hearings and congressional debate.

Appellees argue, however, that the "payout" option is incorporated in a proviso to the portion of § 10 of the Act that authorizes construction of the Pine Flat Dam. The proviso reads: "That the Secretary of War shall make arrangements for payment to the United States by the . . . responsible agency, either in *lump sum* or annual installments, for conservation storage when used." 58 Stat. 901 (emphasis added). *See* note 27. An intention to apply appellees' "payout" theory to the Pine Flat project can hardly be inferred from this simple reference to lump sum payment. There is no evidence that Congress had any knowledge of such a theory. The proviso had another purpose. The Department of the Interior had recommended that Kings River project water users repay construction costs in 40 annual installments, as authorized under reclamation law, H.R. Doc. No. 631, 76th Cong., 3d Sess. IV, VIII (1940); the Corps of Engineers had proposed a discounted lump sum payment. H.R. Doc. No. 630, 76th Cong., 3d Sess. 4-5 (1940). Congress authorized construction of the Kings River project according to the specifications in the report of the Corps of Engineers, but it did not then approve the method and amount of repayment proposed for the project in that report. Instead, a new formula was to be developed in negotiations between the water users and the United States. 58 Stat. 901. *See* note 27. The obvious reason for the reference to "lump sum or annual installments" in the authorization for the Pine Flat Dam was to avoid any intimation in subsequent negotiations that Congress preferred one method of repayment over the other.

Appellees assert that a letter written by Secretary of the Interior Oscar Chapman to Congressman Whittington on Nov. 2, 1950, reflects an interpretation of the lump sum payment proviso of § 10 of the 1944 Act as an option to avoid initial sale of excess lands. The letter was written during the period in which the Department followed the view of the Cohen opinion that by paying construction charges landowners could avoid the requirement that they dispose of excess lands. Given this premise, it would follow, of course, that lump sum repayment pursuant to the proviso in § 10 of the 1944 Act would allow retention of excess holdings. As demonstrated in the text, however, the Cohen opinion, and hence the premise of Secretary Chapman's letter, was in error and was later repudiated. *See* pages 79-86.

mittee after extensive hearings.[178] In 1950 and 1951 bills were introduced to relieve Kings River landowners of acreage limitations in return for a lump sum payment of construction costs; neither passed.[179]

Following this series of defeats in Congress, Kings River water users turned to the Department of the Interior for relief. These efforts also ultimately failed, but only after a highly controversial period of several years, beginning in late 1953, during which the Department authorized and conducted negotiations with Kings River water users on the premise that lump sum prepayment would relieve them of acreage limitations.[180] Only during this relatively brief period, more than 25 years after passage of the last comprehensive acreage limitation statute, did the Department officially adopt appellees' "payout" principle.

Proponents and opponents alike attributed the origins of the theory of "payout" as an alternative to contracting to sell excess lands solely to a memorandum prepared in 1947 by Felix S. Cohen, Associate Solicitor of the Department of the Interior.[181] The Cohen

[178]Hearings on S. 912 before a Subcommittee of the Senate Committee on Public Lands, 80th Cong., 1st Sess. (1947).

[179]H.R. 7915, 81st Cong., 2d Sess. (1950); H.R. 413, 82d Cong., 1st Sess. (1951).

[180]*See* Letter from Douglas McKay, Secretary of the Interior, to Congressman Clair Engle, Mar. 2, 1954, at 3, 1956 Study, *supra* note 142, Part I, Exh. 59.

[181]Memorandum M-35004 from Felix S. Cohen, Associate Solicitor, Dep't of the Interior, to the Commissioner of Reclamation, Oct. 22, 1947, 1956 Study, *supra* note 142, Part I, Exh. 27. Reliance is also placed upon Administrative Letter No. 303 from Michael W. Straus, Commissioner of Reclamation, to the Regional and Branch Directors, Bureau of Reclamation, Dec. 16, 1947, *id.* Exh. 26, which transmitted and explained Solicitor Cohen's opinion to the Bureau's field offices.

For example, in letters defending his authorization of negotiations on a "payout" theory, Secretary Douglas McKay relied only on the Cohen opinion, Administrative Letter No. 303, and § 3 of the 1912 Act. *See* Letters from Douglas McKay to Congressman Clair Engle; Rev. Donald McDonnell; George Sehlmeyer, Master, California State Grange; and C. J. Haggerty, Secretary-Treasurer, California State Federation of Labor, Mar. 2, 1954, 1956 Study, *supra*, Part I, Exhs. 59-62. *See also* Exhs. 36, 39, 40, 42, 46-54, 66, 68. *See generally* Barry Opinion, 68 I.D. at 399-402.

Until 1955 the Department did not attempt to justify its position on any other basis. In that year the House Committee on Government

opinion was thought to have established that payment of construction charges by an irrigation district released its constituent owners of excess land from the obligation to execute recordable contracts as a condition precedent to receiving project water for that land.

The reasoning of the Cohen opinion is as follows: (1) Under the proviso to section 3 of the 1912 Act as interpreted in the King Instructions, payment of construction charges frees the land from acreage limitations; (2) section 3 of the 1912 Act and section 46 of the 1926 Act are integral parts of a comprehensive land-limitation plan; (3) the same rule should therefore apply to section 46 of the 1926 Act. That is the whole of the argument.

The obvious error in this reasoning is that it ignores the distinction between the initial breakup of excess holdings and the subsequent purchase, sale, and consolidation of water rights once they have been acquired. As we have seen, section 3 of the 1912 Act and the King Instructions apply only to the latter and not to the former. They recognize a right to sell and acquire vested water rights without regard to the 160-acre limitation. They assume compliance with the conditions precedent to obtaining such vested water rights, including the requirement that initial excess holdings be disposed of—imposed by regulation prior to 1914 and thereafter by the express provision of section 12 of the 1914 Act and section 46 of the 1926 Act.

With this error corrected, nothing remains. The Cohen opinion does not discuss the unqualified requirement of initial breakup in section 12 of the 1914 Act, essentially re-enacted as section 46 of the 1926 Act. It does not explore the legislative history of the acreage limitation provisions in the 1902, 1912, 1914, or 1926 acts.

Operations requested a comprehensive review of contract negotiations on the Kings River project. *See* Letter from Congressman William L. Dawson to Douglas McKay, Secretary of the Interior, Dec. 7, 1955, 1956 Study, *supra,* Part I, at V. In 1956 the Department furnished the committee with a two-volume study of the history of the "payout" principle and of the negotiations on the Kings River project. *See* Letter from Clarence A. Davis, Under Secretary of the Interior, to Congressman Earl Chudoff, May 25, 1956, *id.* at i.

As we have shown, the correspondence collected in this *post hoc* defense of the "payout" principle is both meager and unpersuasive; most of it simply restates the holding of the King Instructions. *See* notes 173 and 174.

or Congress' purpose in enacting any of them. It does not discuss the Department's regulations or administrative practices. It gives no consideration to the consequences of the rule it announces.

The surprising superficiality of the Cohen opinion may be explained by the political context in which it was issued. It appears to have been a hastily contrived means to achieve an end thought to be of overriding importance to the Department. For whatever reasons, the Bureau of Reclamation had not moved as decisively or uniformly as it might have to enforce acreage limitations.[182] A survey of reclamation projects completed in 1946 and a conference of key Bureau personnel in early 1947 revealed substantial noncompliance with the acreage limitations on many projects.[183] Senator Downey of California and others were marshaling support for a renewed attempt to entirely exempt projects in California, Colorado, and Texas from acreage limitations.[184] Department and Bureau officials wished to present a record of enforcement to Congress as part of an overall defense of acreage limitation provisions.[185] It was considered impracticable at that late date to secure the individual recordable contracts the Bureau had failed to require as a precondition to delivering project water when projects were first opened. The Cohen opinion was prepared as a part of a program to meet this problem. It was transmitted to field offices to provide a means for achieving rapid "compliance" with acreage limitations which could then be reported to Congress, albeit "compliance" by avoidance through payment of construction charges.[186] Secretary of the Interior Oscar Chapman and Commissioner of Reclamation Michael Straus both regarded this procedure as a remedial measure to be applied to then-existing projects, as to which there had been a history of substantial, long standing non-

[182] *See* Landownership Survey, *supra* note 92, at 44-45; King, *supra* note 115, at 196-201.

[183] Landownership Survey, *supra* note 92, at 3-26.

[184] *See* Hearings on S. 912, *supra* note 178.

[185] Administrative Letter No. 303, *supra* note 181, at 3; P. Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 Yale L.J. 477, 492-93 (1955); A. Davis, The Excess Land Law in the Central Valley of California, 1962 (Doctoral Dissertation in the Library of the University of California at Berkeley) at 83, 95 n.259. During the 1947 conference Bureau personnel also expressed the need to present Congress with a record of enforcement. *See* text at note 183.

[186] Administrative Letter No. 303, *supra* note 181.

enforcement. It was not regarded as a policy of general applicability permitting all landowners to avoid the acreage limitation as a matter of course.[187]

Commissioner Straus later changed his position, offering the Cohen opinion as justification for acceptance of lump sum prepayment from Kings River water users.[188] Secretary Chapman disagreed, insisting that the Cohen opinion and the administrative letter transmitting it to the field had not established a general policy applicable to new projects, especially Pine Flat Dam.[189]

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[187] In a memorandum authorizing the Regional Director to accept a lump sum payment of the balance of charges owed by the Klamath Drainage District with the understanding that the acreage limitation would be lifted, Commissioner Straus stated:

> This, however, should not be construed as a precedent for other projects. An offer of prepayment of construction charges at the time of the organization of a district, or in the early years of the contract, obviously would create an altogether different situation.

Memorandum from Michael Straus, Commissioner of Reclamation, to the Director, Sacramento Region, Bureau of Reclamation, Jan. 27, 1948. Administrative Letter No. 303, written by Commissioner Straus, is by its own terms (at page 1) confined to "existing projects." *See* note 181. For Secretary Chapman's position, *see* note 189.

[188] *See, e.g.,* Memorandum from Michael Straus to the Secretary of the Interior, Jan. 18, 1952, 1956 Study, *supra* note 142, Part I, Exh. 36. Commissioner Straus and the Secretary of the Interior sharply disagreed on the applicability of the Cohen opinion to the Pine Flat project. *Id.,* Exhs. 35, 36, 41, 42, 43.

[189] In March 1951 Secretary Chapman wrote to a number of Congressmen explaining the origins of the Cohen opinion and Administrative Letter No. 303, which transmitted the Cohen opinion to the Bureau's field offices. The letter included the following paragraphs:

> You will be interested to know that in the entire State of California no situation exists on a Federal Reclamation project where Administrative Letter 303 has been applied or is being considered.
>
> While the previous degree of non-compliance on the older projects was a serious problem, we are more keenly concerned with the effectiveness of the acreage limitation provisions on the irrigation projects that are now coming into operation and are presently under construction. The great Central Valley Project in your State, for example, and similarly the Columbia Basin Project in Washington, are outstanding opportunities for maintenance of the family size farm. On these, and other new projects, of course, the purposes of Administrative Letter 303 are not relevant because they have been authorized subsequent to the Act of 1926 and are subject to the existing legal requirements for recordable contracts.

In December 1952, Secretary Chapman challenged the authority of the Cohen opinion for any purpose, pointing out that it had not been submitted to the Secretary for approval.[190] The Secretary instructed Commissioner Straus that the Bureau was not to accept full payment of construction charges as an alternative to compliance with acreage limitations, and, specifically, that no such contract was to be negotiated with the Kings River Water Association.[191]

Letter from Oscar L. Chapman to Congressman John Shelley, Mar. 29, 1951, at p. 2, 1956 Study, *supra* note 142. Part I. Exh. 29.

The Secretary was not alone in this view. *See, e.g.,* Memorandum from Richard L. Boke, Director, Sacramento Region, Bureau of Reclamation, to the Commissioner of Reclamation, Oct. 31, 1951, at pp. 2-3, *id.,* Exh. 31.

In June 1952, Secretary Chapman also concluded that because Administrative Letter 303 and the Cohen opinion applied only to old projects on which the acreage limitation provisions had not been enforced, it did not apply to the Pine Flat project. In explaining his position in response to an inquiry, the Secretary stated:

> Administrative Letter No. 303, to which you refer, was promulgated in order to achieve, with respect to certain lands on older projects, the principles then and since laid down by the Congress with respect to acreage limitations on lands benefited by Federal projects. . . .
>
> We have no situation on a Federal reclamation project in the State of California where Administrative Letter No. 303 has been applied or is considered for application.
>
> Concerning the Kings River Project, I have stated previously and wish to assure you that negotiations will proceed only on the basis of compliance with the provisions of the reclamation laws prescribing limitations on the acreage of land which may be benefited, and the conditions under which those lands may be benefited under Federal reclamation.

Letter from Oscar L. Chapman to Professor Correll M. Julian, June 23, 1952, *id.,* Exh. 44.

[190] Memorandum from Oscar L. Chapman to the Commissioner of Reclamation, Dec. 23, 1952, *id.,* Exh. 47.

[191] *Id. See also* Letter from Oscar L. Chapman to Senator Paul H. Douglas, Jan. 17, 1953, *id.,* Exh. 50.

There is a conflict in the Department's files as to whether Secretary Chapman withdrew his order of Dec. 23 in the closing days of the Administration. *Contrast* Memorandum for the Record from Michael W. Straus, Commissioner of Reclamation, Feb. 6, 1953, *id.,* Exh. 54, *with* Memorandum for the Files from Fred A. Clarenbach, Program Staff, Bureau of Reclamation, Feb. 3, 1953, *id.,* Exh. 55.

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After the change of Administration in 1953, the Bureau was authorized to negotiate a Kings River repayment contract embodying the lump sum prepayment principle. Sole reliance was placed on the Cohen opinion.

Late in 1955, subordinate Bureau officials completed negotiation of a contract with the Kings River Conservation District, a service-area-wide entity created for the purpose of contracting with the United States for Pine Flat repayment. The contract included a provision allowing individual landowners to avoid sale of their excess lands at nonspeculative prices by paying that portion of the total construction charges that could be fairly allocated to their individual holdings.[192] Protests followed. The Department advised correspondents that questions of law and policy underlying the contract were being reviewed.[193] In mid-1957, Solicitor Elmer F. Bennett issued an opinion concluding that "Congress has not authorized accelerated payments by individual landowners of their aliquot part of the district liability as a means of evading excess land limitations."[194] Acting upon this opinion, the Secretary disapproved the proposed contract, stating that to permit individual prepayment to have the suggested consequence "would reduce the statutory limitations to a mere shadow. This would make the test, not one of public policy, but solely one of the financial capability of each landowner to purchase immunity from the statutory restrictions."[195]

Negotiations were resumed, but with a view toward executing separate repayment contracts with the various canal companies and irrigation and water storage districts in the service area. Pro-

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[192] *See* Articles 3(b) and 6, Draft Contract between the United States of America and the Kings River Conservation District, Oct. 27, 1955, *id.*, Part II, Exh. 52.

[193] *Id.*, Part I, Exhs. 84-100. Secretary of the Interior McKay left office in the spring of 1956 without signing the proposed contract. P. Taylor, *The Excess Land Law: Pressure vs. Principle,* 47 Calif. L. Rev. 499, 520 (1959); Barry Opinion, 68 I.D. at 401.

[194] 64 I.D. 273, 278-79 (1957).

[195] Letter from Fred A. Seaton, Secretary of the Interior, to Philip A. Gordon, President, Board of Directors, Kings River Conservation District, July 12, 1957, at p. 3.

posed contracts were again agreed upon. They include a provision that upon payment of all construction charges by the contracting district or company its constituent landowners would be relieved of the requirement that they sell excess lands at nonproject prices.[196] Secretary of the Interior Fred A. Seaton declined to execute the contracts. Because of the considerable opposition to the Department's position, the widespread public interest in the question, and its "transcendent importance in the administration of the Federal reclamation laws," he requested an opinion of the Attorney General on the basis of which the "payout" issue might "definitely be set at rest within the Executive Branch."[197] The effect of the Secretary's request, transmitted one day before he left office, was to defer the final decision on "payout" to the incoming administration.[198] The incoming Attorney General returned the proposed contracts to the Department of the Interior for initial consideration. In December 1961 Solicitor Barry issued an opinion concluding that the "payout" provision in the proposed contracts was unlawful. In striking contrast to the Cohen opinion, Solicitor Barry's memorandum fully exposed and explored all aspects of the problem, including the purposes of the excess land limitations, the terms and legislative history of each of the relevant statutes, the regulations issued by the Department, the administrative practices of the Department over the years, and the consequences of the alternative solution. On the basis of this examination, Solicitor Barry concluded that "[p]ayout is not relevant to the recordable contract requirement of Section 46 of the 1926 Act," but only to subsequent consolidation of vested water rights first acquired in accordance with the law.[199] Attorney General Robert F. Kennedy concurred in Solicitor Barry's conclusions.[200] The doctrine thus established, rejecting payout as an alternative to compliance with

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[196]Barry Opinion, 68 I.D. at 374-75.

[197]Letter from Fred A. Seaton to Attorney General William P. Rogers, Jan. 19, 1961.

[198]P. Taylor, *Excess Land Law: Secretary's Decision?*, 9 U.C.L.A. L. Rev. 1, 5 (1962).

[199]68 I.D. at 404-05.

[200]Letter from Robert F. Kennedy to the Secretary of the Interior, Dec. 29, 1961, 68 I.D. 370.

section 46 of the 1926 Act, has remained Department policy to the present.[201]

In sum, except for a period of a half dozen years, the administrative practice of the Department has been either inferentially or expressly contrary to appellees' theory of "payout" as an alternative to initial redistribution of excess lands. The theory's sole claim to legitimacy was the 1947 Cohen opinion. That opinion was invoked beyond its intended purposes. In any event, it was patently wrong. Its authority was soon challenged; it remained hotly contested throughout; and it was soon overruled. The substance of the Department's construction of section 46 during this brief interlude must be rejected in view of the repeatedly endorsed public policies involved in limiting initial holdings of private lands receiving water from federal reclamation projects, the compelling legislative history of each successive excess land statute, the unambiguous regulations and early administrative practice on which the 1926 Act was built, and the general scheme of enforcement of the acreage limitations since 1902.

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[201] Appellees have sought support for their payout argument by citing provisions in a number of contracts negotiated with water users' organizations after 1947, some of which were submitted to and approved by Congress pursuant to § 7 of the Reclamation Project Act of 1939. Section 7, Act of Aug. 4, 1939, ch. 418, 53 Stat. 1187, 1192, 43 U.S.C. § 485f. For the most part, the contract clauses relied upon are general in terms and consistent with the holding of the King Instructions that lands initially in compliance with the acreage limitation may be consolidated into larger tracts after payout. A few do contemplate avoidance of the requirement of initial breakup of excess holdings. However, these were drafted during the period when the Cohen opinion prevailed as Department policy. They have no significance independent of that opinion, since repudiated. Barry Opinion, 68 I.D. at 401. *See* 1956 Study, *supra* note 142, Part I, at 54; Letter from Douglas McKay, Secretary of the Interior, to Congressman Clair Engle, Mar. 2, 1954, at p. 2, 1956 Study, Part I, Exh. 59.

Appellees can derive no additional support from congressional approval of these contracts. The contracts were submitted for the purpose of obtaining approval of provisions having nothing to do with acreage limitations. Letter from Douglas McKay to Clair Engle, *supra*, at 2; 1956 Study, *supra*, Part I, at 54; P. Taylor, *The Excess Land Law: Pressure vs. Principle*, 47 Calif. L. Rev. 499, 521-22 (1959). There is no indication that Congress ever gave consideration either to these provisions, or to appellees' "payout" theory.

There is no basis for implying an exception to the absolute language of section 46 that would permit excess landowners to escape the obligation of that provision by payment of construction charges.

The Kings River project is subject to the reclamation laws. Landowners in that project must execute recordable contracts to sell their excess land at ex-project prices in compliance with section 46 in order to receive project water for their excess lands, even if the irrigation district or other contracting agency through which they receive project water repays its share of the irrigation costs of the Pine Flat Dam.

Reversed.

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EXHIBIT B

Order on Petition for Rehearing
United States Court of Appeals
for the Ninth Circuit
Dated June 7, 1976

(Pages 88A to 90A)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 72-2322

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

TULARE LAKE CANAL COMPANY, a corporation,
Defendant-Appellee,

TULARE LAKE BASIN WATER STORAGE DISTRICT and
SALYER LAND COMPANY, a corporation,
Intervenor-Defendants-Appellees.

Before: BROWNING, DUNIWAY, and WALLACE, Circuit Judges

Appellees suggest that Congress could not have intended the result reached because the lands in the Pine Flat project were not arid, and the lands, the water rights, and the canals and other irrigation works were privately owned. In these respects, Pine Flat does not differ from the typical reclamation project. It is usually true that most of the land included in a reclamation project is privately owned; it is usually true that the private lands are already under irrigation through facilities developed at private expense; it is usually true that the reclamation project only supplements or regulates existing water supplies. Congress was aware of these facts. *See* slip opinion at 17-20, 32-35, 41.

Appellees also argue that the government should be estopped because various government officials represented that privately owned water rights would not be affected by the Pine Flat project. The fact is that privately owned water rights of these appellees are not affected by the project. Owners of excess lands on the project may retain both all of their pre-project water rights and all of their lands. If a particular landowner does not believe that the irrigation benefit resulting from the project (primarily a regulated water supply) is of sufficient value, he can forego that benefit and retain his excess land along with its pre-existing water supply. *See* slip opinion at 4 & n.3. Section 46 of the 1926 Act requires a landowner to execute a recordable contract only if project water is to be furnished to the land; it does not impose an absolute requirement that all excess land be sold. It should be noted that the irrigation benefits created by the Pine Flat project are not inconsiderable. The initial Corps of Engineers report estimated the value of annual irrigation benefits from the dam would be $995,000; the Bureau estimated their value would total $1,255,000. By 1948 the Corps had revised its estimates and concluded that the value of irrigation benefits would total $3,382,000 annually. The Corps also concluded that annual flood control benefits would total only $2,126,000, thus making Pine Flat predominantly an irrigation project. A. Maass, "The Kings River Project," *Inter-University Case Program, Cases in Public Administration and Policy Formation* 566 (1952).

If an owner of excess lands elects to receive the irrigation benefits of the project, then he must agree to sell his excess land for its present full market value, including the value of his pre-existing water rights, and of all improve-

ments, and excluding only the increase in the value of the land attributable to the dam itself, and that alone. *See* slip opinion at 34-35 n.74.

The panel has voted to deny the petitions for rehearing and to reject the suggestions for a rehearing in banc. The full court has been advised of the suggestions for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestions for rehearing in banc are rejected.

EXHIBIT C

Opinion
United States District Court
Eastern District, California
Dated January 6, 1972

(Pages 91A to 97A)

UNITED STATES of America,
Plaintiff,

v.

TULARE LAKE CANAL COMPANY,
a corporation, Defendant,

and

Tulare Lake Basin Water Storage District and
Salyer Land Company, a corporation,
Intervenor Defendants.

Civ. No. 2483.

United States District Court,
E. D. California.

Jan. 6, 1972.

Action by the Government to enjoin defendant from delivering stored water released to it from dam and reservoir to any lands in excess of 160 acres in any one ownership unless the owner complied with the reclamation law. The District Court, Crocker, J., held that the dam and reservoir was not a reclamation or irrigation project, but was a flood control project with incidental conservation storage for irrigation; thus, defendant was not subject to 160-acre limitation of the reclamation laws.

Injunction denied.

1. Water and Water Courses

Dam and reservoir from which stored water was released to defendant was not a reclamation or irrigation

project, but was a flood control project with incidental conservation storage for irrigation; thus, defendant, in delivering the water to landowners, was not subject to 160-acre limitation of the reclamation laws. Flood Control Act of 1944, §§8, 10, 58 Stat. 887.

2. Waters and Water Courses

Even if reclamation laws applied to water which was stored behind dam and which was released to defendant for delivery to landowners for irrigation purposes, the 160-acre limitation of the reclamation laws did not apply to defendant where defendant had paid the government its entire share of cost of constructing the dam. Flood Control Act of 1944, §§8, 10, 58 Stat. 887.

—o—

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Ernest M. Clark, Jr., Robert M. Newell, Los Angeles, Cal., for intervenor-defendant Tulare Lake Basin Water Storage Dist.

C. Ray Robinson, William T. Ivey, Jr., Merced, Cal., for intervenor-defendant Salyer Land Co.

MEMORANDUM AND ORDER

CROCKER, District Judge.

The United States brought this action for an injunction to restrain the defendant, Tulare Lake Canal Company, from delivering stored water released to it from Pine Flat Dam and Reservoir to any lands in excess of 160 acres in any one ownership unless the owner complied with the legal requirements of reclamation law.

Intervenors, Tulare Lake Basin Water Storage District and the Salyer Land Company, obtained leave to intervene as parties defendant.

Defendant, Tulare Lake Canal Company, admits that stored water is being delivered to the excess land of the Chatom Company which has not executed a recordable contract for the sale of excess land.

All parties concede that the Pine Flat Dam and Reservoir was built pursuant to the Flood Control Act of 1944 and that the terms of the said Act are controlling with respect to the delivery of water to the defendants.

Plaintiff contends that Section 8[1] of the Flood Control

1. "Hereafter, whenever the Secretary of War determines upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and finding thereon have been made by the Secretary of the Interior as provided in said federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such reports may be predicated on the allocation to irrigation of an appropriate portion of the cost of the structures and

(footnote continued on next page)

Act of 1944 requires application of reclamation law and defendant contends that Section 10[2] of the same Act prevents the imposition of reclamation law. Defendant also claims that if reclamation law does apply, lump sum payment of allocable costs of construction of the dam relieves them of the 160 acre limitation and also that applying acreage limitation to them would be unconstitutional.

The value of a dam at Pine Flat has long been recognized as it would regulate the flow of the Kings River and thus prevent flood damage and would provide water for irrigation when it was needed instead of when nature sent it down the stream.

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facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirements shall not prejudice lawful uses now existing; provided, that this section shall not apply to any dam or reservoir heretofore construed in whole or in part by the Army Engineers, which provides conservation storage of water for irrigation purposes."

2. "That the following works of improvement for . . . the control of destructive flood waters and other purposes are hereby adopted and authorized . . . to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein . . . .

* * *

"The project for flood control and other purposes for the Kings River and Tulare Lake Basin, California, is hereby authorized substantially in accordance with the plans contained in House Document Numbered 630, Seventy-sixth Congress, third session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable at an estimated cost of $19,700,000: Provided, That the conditions of local cooperation specified in said document shall not apply: Provided further, That the Secretary of War shall make arrangements for payment to the United States by the State or other responsible agency, either in lump sum or annual installments, for conservation storage when used: Provided further, That the division of costs between flood control, and irrigation and other water uses shall be determined by the Secretary of War on the basis of continuing studies by the Bureau of Reclamation, the War Department, and the local organizations."

The U. S. Army Corps of Engineers proposed to build the dam as a flood control project and the Bureau of Reclamation desired to build the dam as a reclamation project. The legislative history cited by all parties to this lawsuit supports their position as so much was said by Congress, the President and the various governmental agencies that citations are available for all positions.

It appears that Congress settled the dispute in favor of flood control. Not only did it entitle the act authorizing the construction of Pine Flat Dam and Reservoir the Flood Control Act of 1944, but it entrusted the construction to the U. S. Army Corps of Engineers under the direction of the Secretary of War.

There were many reasons which prompted Congress to reach this decision, some of which are:

1. Studies showed flood control benefits to be greater than irrigation benefits.

2. The Government claims no water rights in the Kings River.

3. All the water rights to the Kings River are vested in the water users.

4. The dam would not create supplemental water which could be sold by the Government.

5. Arid land would not be reclaimed by reason of the dam being built.

6. All the canals and ditches carrying water from the Kings River to the farms are owned by the water users.

7. 200,000 acres known as the Tulare Lake Basin are subject to flood and drought, and are not adaptable to actual settlement as contemplated by the reclamation laws.

Thus the Pine Flat Dam and Reservoir is not a reclamation or irrigation project but is actually a flood control project with incidental conservation storage for irrigation. Congress provided that the water users pay the costs of the dam attributable to conservation storage which the Secretary of War has determined to be $14,250,000. In addition, the water users are required to pay a share of the costs of operation, maintenance and contract administration in return for the privilege of storing their water behind the dam.

Acreage limitations were not proposed by the Army Engineers in their reports submitted to Congress. Congress adopted these reports and incorporated them into the Flood Control Act of 1944. Congress never intended that acreage limitations be applied to the water stored behind the Pine Flat Dam or it would have said so.

The Government contends that Section 8 (Footnote 1, supra) of the Act requires the application of acreage limitations but this section would apply only if supplemental water were developed which would be owned by the Government and could be sold, or to water that would be delivered through canals and ditches built by the Bureau of Reclamation, neither of which occurred.

Section 10 (Footnote 2, supra) of the 1944 Act specifically authorizes the Secretary of War to make arrangements for payment to the United States for water storage either in lump sum or annual installments and to determine the division of costs between flood control and irrigation.

The defendant, Tulare Lake Canal Company, having vested rights in the water in the Kings River and having paid the United States its share of the cost of constructing Pine Flat Dam, as determined by the Secretary of War, is not subject to the 160 acre limitation of the reclamation laws.

Therefore, the Government's request for an injunction is denied, because reclamation laws do not apply to water stored behind the Pine Flat Dam, and if they did, pay-out relieved defendant of the 160 acre limitation.

In view of this conclusion, the constitutional questions raised by defendant were not reached.

Counsel for defendant is directed to prepare and lodge findings of fact, conclusions of law and form of judgment in accordance with the Local Rules of this court.

Nos. 76-554 and 76-555

Supreme Court, U. S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1976

TULARE LAKE CANAL CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

SALYER LAND COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

PETER R. TAFT,
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-87A) is reported at 535 F. 2d 1093. The opinion of the district court (Pet. App. 91A-97A) is reported at 340 F. Supp. 1185.

JURISDICTION

The judgment of the court of appeals (omitted from petitioners' appendix) was entered on April 5, 1976. Timely petitions for rehearing with *en banc* suggestions were denied

on June 7, 1976 (Pet. App. 88A-90A). On August 13, 1976, Mr. Justice Rehnquist extended the time to file the petitions for a writ of certiorari to October 20, 1976. The petitions were filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Congress, in the Flood Control Act of 1944, by inference exempted water users in the Kings River service area who receive irrigation benefits from Pine Flat Dam and Reservoir from the acreage limitation provisions of federal reclamation law.

2. Whether Congress intended to permit landowners, otherwise subject to the acreage limitation provisions of federal reclamation law, to avoid sale of excess acreage by prepayment of those construction costs of a project allocable to irrigation benefits.

STATEMENT

The United States brought this action in the United States District Court for the Eastern District of California to restrain petitioner Tulare Lake Canal Company from delivering "project water" from the Pine Flat Dam project to excess landholdings unless the owners of the excess lands executed recordable contracts for sale in compliance with Section 46 of the Omnibus Adjustment Act of May 25, 1926, 44 Stat. 649, as amended, 43 U.S.C. 423(e) (Pet. App. 93A). The action was brought as a "test case" in order to obtain a binding resolution of a continuing dispute between the United States and water diverting entities on the Kings River over application of the federal reclamation laws, including excess acreage limitations, to Kings River projects.

The United States has asserted throughout this litigation that the Flood Control Act of 1944, 58 Stat. 887, as amended, 16 U.S.C. 460d, authorizing the Pine Flat Dam,

made federal reclamation law applicable to that project (Pet. App. 94A). In particular, the United States believes that petitioners must comply with Section 46 of the Omnibus Adjustment Act of May 25, 1926, which prohibits delivery of project water to "irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres" unless the owner of the excess lands executes "valid recordable contracts for the sale of such lands * * *." Petitioners, on the other hand, have argued that the Flood Control Act of 1944 renders federal reclamation law inapplicable to the Pine Flat Dam project and that, in any event, sale of excess lands is not required when the owners of such lands prepay their share of construction costs for the project allocable to irrigation benefits.

The district court accepted petitioners' position on both grounds (Pet. App. 91A-97A). In a lengthy opinion, the court of appeals reversed, holding that Congress had specifically rejected the proposal that federal reclamation laws not apply to projects authorized under the Flood Control Act of 1944, including the Pine Flat Dam project in particular, and that petitioners' efforts to secure judicial modification of this decision should likewise be rejected. The court also concluded that Congress did not intend to permit the objectives of the excess acreage provisions in federal reclamation law—"to encourage family farms, distribute the reclamation subsidy widely, and avoid speculation"(Pet. App. 67A)—to be defeated by prepayment of construction costs allocable to irrigation benefits. Denying a petition for rehearing, the court of appeals pointed out that owners of excess lands remained free to retain all their lands and forego the irrigation benefits but could not take project water for such lands without compliance with governing reclamation law (Pet. App. 89A-90A).

ARGUMENT

This case, while of apparent significance to the particular landowners involved, involves no issue of demonstrated general importance, conflicts with no decision of this Court or any court of appeals, and does not merit further review. We believe that the court of appeals, which gave this matter extensive consideration and wrote a thorough opinion, correctly decided that petitioners are subject to the federal reclamation laws, including the excess-acreage limitations, and cannot avoid the policies of those laws, and secure a windfall from construction of the Pine Flat Dam, by prepayment of the construction costs allocable to irrigation benefits.[1]

1. Although projects authorized under the Flood Control Act of 1944 are widely dispersed throughout the country, no other federal court of appeals has yet been called upon by landowners to hold the federal reclamation laws inapplicable to such projects. Indeed, petitioners themselves do not argue that the federal reclamation laws never apply to Flood Control Act projects but rather that such laws apply only where the Department of Interior has constructed additional irrigation works (Pet. 36-37).[2] In this case, petitioners state that no irrigation works were added, that project water was already fully appropriated, and that no new lands were reclaimed. In view of these narrow circumstances, and the absence of litigation during the past

[1]We also agree with the court of appeals (Pet. App. 41A) that, contrary to the assertion of petitioner in No. 76-555, Congress intended that Section 8 of the Flood Control Act of 1944 should apply to the lands of Tulare Lake Basin despite their origins as swamplands. As the court noted (*ibid.*), "[o]nly a brief exposure to reclamation jargon is required to learn that all of the land area of the United States west of the 98th meridian is commonly referred to as 'arid or semi-arid.'"

[2]Citations to "Pet.," unless otherwise noted, refer to the petition filed in No. 76-554.

thirty-two years, the application of reclamation laws to Flood Control Act projects is not an issue of sufficient immediacy and importance to warrant this Court's attention.

Nor does the question of prepayment of construction costs under the Omnibus Adjustment Act of May 25, 1926 merit further review. Although the court of appeals described (Pet. App. 43A) this issue as "the more far reaching" of the two questions presented in this case, apparently the question has not proved sufficiently troublesome to require the attention of any other federal court of appeals.[3] Moreover, despite the broad applicability of the federal reclamation laws, transfer of excess lands under the 1926 Act will have occurred in many cases and prepayment theories would now be inapplicable to such lands. "Ordinarily, * * * disposition of lands pursuant to recordable contracts would be expected to have occurred long before the usual repayment period has run its course so that by the end of that period few, if any, lands would in the usual case remain subject to the recordable contracts" (68 I.D. 370, 376). We do not believe this to be a proper case in which to consider whether retention of excess lands may have been permitted in other instances (Pet. 31) and, if so, what the consequences of such action should be.[4]

[3]We note that two cases involving the applicability of acreage limitations and residency requirements to lands in the Imperial Valley in California, but presenting somewhat different issues from the narrow issues presented in this case, are now under consideration in the Ninth Circuit. *United States* v. *Imperial Irrigation District* and *Yellen* v. *Morton*, Nos. 71-2124, 73-1333, and 73-1388.

[4]Although officials in the Department of the Interior for a relatively brief period regarded prepayment of construction costs as a possible alternative to sale of excess lands (Pet. App. 79A *et seq.*), that position was repudiated in 1961 (68 I.D. 370), and has not been resurrected.

Finally, we do not believe that petitioners' predictions of economic desolation for the Tulare Lake Basin area offer any compelling reason for review by this Court. To the extent that these prophecies constitute an attack on the general objectives of the federal reclamation laws, this Court has already resolved that matter adversely to petitioners' position in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275. To the extent that the argument represents an attack on application of the reclamation laws to the Pine Flat project alone, we note that the district court made no finding that the area could not be farmed in 160-acre tracts. Moreover, the court of appeals made clear (Pet. App. 37A-38A, 50A) that its decision in this case did not decide the question whether existing or new landowners could consolidate properties or enter into leasing arrangements so as to maximize the economic potential of these lands. The decision merely requires the initial breakup of large holdings (provided always that the landowner accepts irrigation benefits for his excess lands) to allow greater distribution of benefits from the projects.

2. In any event, we believe that the court of appeals correctly rejected petitioners' arguments a) that the Flood Control Act of 1944 exempted the Pine Flat Dam from the federal reclamation laws and b) that, should the reclamation laws be held applicable, owners of excess lands (who accept delivery of water for such lands) can nonetheless avoid executing contracts for their sale by prepaying construction costs. While full review of the court's 87-page opinion seems unwarranted, several points made in that opinion merit special emphasis.

a. Contrary to petitioners' contention (Pet. 35-37), the court of appeals properly understood the nature of the compromise reached between the California landowners, who wished the Pine Flat Project to be constructed and operated solely by the Corps of Engineers, and the

Roosevelt Administration, which sought to have the project built and operated by the Department of the Interior. The legislative history contains numerous references to the need to deny windfall profits to large landholders and to distribute the benefits of such projects to small farmers through application of the excess acreage provisions of Section 46; indeed, Congress made revisions in the 1944 Act to reflect more clearly such concerns (see generally Pet. App. 9A-43A). By contrast, the legislative history contains no evidence that Congress, despite these concerns, wished to exempt the Pine Flat Dam project.

Petitioners' related argument (Pet. 34-35) that the third sentence of Section 8 of the Flood Control Act of 1944 must be read as limited by the first and second sentences of that Section amounts, as the court of appeals pointed out (Pet. App. 39A), to an argument that the third sentence should not be read at all. The first two sentences provide ample authority for applying the reclamation laws to projects involving additional works for irrigation; the third sentence, if applied only to such projects, would simply be redundant. Nor do petitioners offer any authority to support their contention (Pet. 37) that Section 10 of the Act was intended to exempt projects that supply water storage benefits from the requirements of the reclamation laws. Had Congress wished to exempt such projects, presumably it would have said so plainly.

b. Petitioners' contention that prepayment of construction costs allocable to irrigation benefits should entitle them to retain their excess lands embodies two incorrect assumptions.

First, to sustain this contention, petitioners necessarily must argue that the objectives sought by Congress through passage of the federal reclamation laws could be achieved merely by assuring reimbursement of a fraction of a project's cost. But, as Solicitor Barry of the Department of the Interior correctly observed in 1961 (68 I.D. at 395):

> Such a qualification of Section 46 would reduce the relationship between the United States and the irrigation water users to that of debtor and creditor; it would render this provision of the Federal reclamation laws purely and simply a security device; and for the broad objectives of the reclamation program it would substitute merely the concern of a creditor for his loan.

The legislative history of Section 46 provides no basis for assigning it so narrow a purpose.

Second, petitioners must argue that prepayment of construction costs allocable to irrigation benefits leaves holders of excess lands unsubsidized by the project. This position was rejected by the court of appeals. While recognizing that such landowners by prepayment forego part of the subsidy, the court noted (Pet. App. 47A-48A):

> The benefits bestowed by a reclamation project often exceed the costs landowners are required to repay. Users of project water * * * are not charged with project costs attributable to navigation, flood control, salinity prevention, production of hydroelectric power, storage of water for industrial and municipal uses, and other uses not directly related to irrigation. They may, however, receive substantial benefits from such nonreimbursable expenditures. Over half the cost of the Kings River Project, for example, was allocated to flood control and was not charged to irrigators. Yet the benefit of flood control accrued almost entirely to irrigators through elimination of flood damage to soil, crops and livestock in Tulare Lake Basin * * *. Moreover, the value attributable to improved productivity of the land when irrigated may exceed the cost of irrigation facilities, even aside from the element of subsidy. Congress anticipated that this would be true, and was aware of the consequent serious potential

> for speculation. It was the purpose of the requirement of section 46 that excess lands be sold at ex-project prices to eliminate this windfall advantage. Thus, because of subsidy and increased productivity, the charges to be repaid by irrigators normally represent only a part of the enhancement in value resulting from the project. By paying off the allocated costs, large landowners would secure this enhanced value for themselves at a fraction of its worth. [Footnotes omitted.]

The fact that no new lands were developed by the Pine Flat Project and "private water rights" are involved does not provide a basis for exemption from the reclamation laws or even serve to distinguish this project from other projects. It has long been recognized that private rights in land are subject to this law. This Court noted in *Ivanhoe Irrigation District* v. *McCracken, supra,* 357 U.S. at 283, that much of Central Valley Project was "reclaimed and irrigated at the inception of the project." In fact, on the Madera Irrigation District 85,000 of a total of 112,000 acres had been developed for irrigation before the Central Valley Project was authorized. *Madera Irrigation District* v. *All Persons,* 47 C. 2d 681, 686, 306 P. 2d 886, 889.[5] The court of appeals and Congress were aware that reclamation project benefits often consist, not in the development of substantially more total water, but in providing the storage and regulation of water so it is available when and where needed, an important matter in the arid West (Pet. App. 4A, n. 3, and 88A).

c. Petitioners' insistence that their excess lands must be sold below "actual value" (Pet. 33) demonstrates only their disagreement with the basic, recognized policies of the

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[5]The *Ivanhoe* opinion also shows that there is nothing unfair or compulsory in this result. Large holders need not sell their excess lands as long as they do not use the new water services and rely on their own pre-existing water rights and storage and irrigation facilities (357 U.S. at 285-286).

reclamation laws. Section 46 of the Omnibus Adjustment Act of May 25, 1926 provide that the recordable contracts for sale of excess lands must be at appraised value "without reference to the proposed construction of the irrigation works." Only to the extent that proposed construction of the irrigation works causes land prices to appreciate, therefore, must the required sale be at a price below actual value. Petitioners' complaint is simply that they must be allowed to retain the fortuitous benefits created solely by the decision to proceed with the project. Those are precisely the benefits that Congress wished to distribute by requiring the sale of excess lands which receive project water.

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

We submit this reply brief on behalf of petitioners Tulare Lake Canal Company and Tulare Lake Basin Water Storage District in support of their petition for a writ of certiorari herein.

Respect for the time of this Court and its Rules precludes any lengthy reply to the Brief for the United States in Opposition (hereafter "Gov. Br."). Some of the contentions urged by the Government, however, do require comment.

1. The main reason why the Government opposes the grant of certiorari in this case appears to be the Government's view that this case "involves no issue of demonstrated general importance" (Gov. Br., p. 4). We respectfully disagree:

(a) We think the Ninth Circuit would also disagree. For the decision of the Ninth Circuit suggests, we submit, that the court below believed it was deciding issues of "demonstrated general importance." The Ninth Circuit recognized that its opinion affected some 90 projects authorized by the Flood Control Act of 1944. But the Ninth Circuit went even further—in explicit terms, it recognized that its decision of the prepayment issue under federal reclamation law

> "affect[ed] all federal reclamation projects subject to section 46 of the 1926 Act." (App., Ex. A, p. 43A)

The national implications of the Ninth Circuit's decision are vividly illustrated in two appendices annexed to this reply brief. Appendix A is a Government prepared list of all reclamation projects authorized for construction through January 2, 1971—some five years ago. Those projects are located in all seventeen of the states west of the 100th meridian and in four of the eleven judicial circuits of the United States Courts of Appeal. Appendix B is a list of flood control projects authorized by the Flood Control Act of 1944—these projects are located in thirty-two states located in ten of the eleven judicial circuits of the United States Courts of Appeal. In addition, there are numerous subsequent flood control acts, and other legislation, to which Section 8 of the 1944 Act, whatever its scope, purportedly applies.

Clearly, millions, if not billions, of dollars of Government funds have been invested in those projects. And, to the best of our knowledge, Congress continues to authorize construction of new reclamation and flood control projects —projects which will be directly affected by the Ninth Circuit's decision concerning the appropriate application of federal reclamation law to such projects.

In these circumstances, we think it is a matter of "demonstrated national importance" for this Court to review, among other things, the determination of the Ninth Circuit that one of the basic goals of federal reclamation law, intended by Congress, was

> "to accomplish the redistribution of large privately owned tracts at prices substantially below the actual value of such lands at the time of sale." (App., Ex. A, p. 49A)

(b) Whatever the Government's present position, the issues presented by this case, as we have already pointed out (Pet., pp. 13-20), have been the subject of long and intense study by, and controversy between, those branches of the Executive responsible for administration of the laws in question.

It was in the context of this administrative and public concern, among other things, that a former Secretary of the Interior in 1961 recognized the "widespread interest" in these questions and their "transcendent importance in the administration of the Federal reclamation laws." (D. Ex. Y5) (Pet., pp. 18-19).

For the Government to suggest now (for the first time in the extended history of this controversy) that such issues —so long the subject of intense congressional and adminis-

trative effort and concern (Pet., pp. 13-20)—are not worthy of review by this Court because they are not of "demonstrated national importance" is, we submit, tantamount to saying that the federal reclamation laws are *not* of national importance and that fundamental issues concerning their interpretation are *not* worthy of review by this Court.

This Court, however, has recognized that "issues of basic importance to the federal reclamation laws" are worthy of such review, *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275, 277 (1958).

(c) The Government concedes this is a "test case." As that expression connotes, the issues involved go beyond the interests of the parties to this litigation and the Pine Flat Dam. We think we have already amply demonstrated how broad and important those interests are (Pet., pp. 28-39; pp. 2-3, *supra*).

(d) In view of the foregoing, we think it clear that the Ninth Circuit's decision has a direct impact on the present and future stability and productivity of a significant portion of this nation's agricultural economy. By way of example, if the impact of the decision were limited to the service area of the Kings River—clearly it goes far beyond —we would already be talking of irrigable farmland of 850,000 acres, a tract larger than the State of Rhode Island. And if the irrigable farmlands of the service areas of the Kern, Kaweah and Tule Rivers (the areas in which the North Kern Water Storage District, *et al.* as *amici curiae,* are interested) were to be added to this total, the farmlands affected by the Ninth Circuit's decision would equal a tract of land larger than the State of Delaware.

(e) To sum up: the issues in this case are, we suggest, of "demonstrated national importance"—a fact which the record demonstrates all responsible Government officials who have dealt with these issues over the years have fully recognized. It is fallacious to suggest as the Government now does, that these issues are not worthy of review by this Court, because this is the first opportunity the Court has been given to review them. In view of the significance of these issues, both in terms of their fundamental importance to federal reclamation law and their broad impact on the agricultural economy of this nation, the Court should now seize the opportunity to decide those issues.

2. The Government's Brief makes certain misstatements concerning the record below. At page 6, the Government states that the district court made no finding that the Kings River service area could not be farmed in 160-acre tracts. The district court did make such a finding (undisturbed by the Ninth Circuit), as follows (R.A. 2595):

> "[B]ecause of flooding, drought, soil conditions and inadequate domestic and irrigation water supplies, the 200,000 acres known as the Tulare Lake Basin are not adaptable to actual settlement by family farmers in 160-acre or 320-acre parcels as contemplated by federal reclamation laws."

3. The Government's reference (Gov. Br., pp. 4 and 5) to the absence of other litigation on these issues during the 32 years since passage of the 1944 Flood Control Act is misleading. There was no occasion for such litigation until December 26, 1961 when the new Solicitor of the Department of the Interior, Frank J. Barry, issued his opinion (68 I.D. 372) repudiating the so-called "pay-out" principle. Until that day the Kings River farmers, and many others,

had been relying on repeated assurances by responsible officials of the Department of the Interior that the pay-out principle would be included in their repayment contract for use of the storage space in the Kings River Reservoir.*

The announcement of the Barry decision created for the first time a controversy which had to be resolved in the courts. This action was instituted *by the United States* approximately two years later as a "test case." All interested parties are awaiting the outcome of the Government's own "test case," and there is no need for other litigation while the "test case" is pending.

4. The Government's Brief suggests that all the Ninth Circuit has done is to insure that the farmers in the Kings River service area, as well as in other areas, will not "secure a windfall" by prepaying the construction costs allocable to the irrigation benefits of a flood control project (Gov. Br., p. 4), while retaining all the other benefits of the project—*i.e.*, flood control, salinity prevention, navigation, production of hydroelectric power, etc. (Gov. Br., pp. 8-9).

We respectfully submit this is an argument based on a total misconception of the concepts of "windfall" and "subsidy," as those concepts have been developed over the years with respect to federal reclamation law and federal flood control law. The Government did not contend in either of the courts below that any element of subsidy of whatever character is involved in this case.

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* See the discussion at pp. 29-32 of the brief of North Kern Water Storage District, *amici curiae,* concerning the trial court's Findings of Fact that the Kings River farmers had relied to their detriment upon these repeated assurances from officials of the Department of the Interior. Those Findings were not disturbed by the Court of Appeals.

As to "subsidy," the interest-free 40-year installment payment procedures which are available to farmers under federal reclamation law is, of course, a direct and substantial financial subsidy. But by prepaying this entire obligation, petitioner Tulare Lake Canal Company has foresaken this subsidy. Until Solicitor Barry's 1961 opinion, the Bureau of Reclamation had treated acreage limitations as the "quid pro quo" for the financial subsidy represented by the 40-year interest-free repayment plan. Until Solicitor Barry's 1961 opinion, the acreage limitations provisions were deemed inapplicable if the subsidy were eliminated by prepayment. The same principle was applied by Congress in the Small Reclamation Projects Act of August 6, 1956 (70 Stat. 1044), and in other statutes, which provide that acreage limitation provisions are not applicable to landowners who waive the financial subsidy either by prepayment in full, or by paying interest on deferred installments.

But the other benefits which a farmer may obtain, as in this case, from a *flood control project,* have never been deemed to be "windfalls" although there is no reimbursement to the federal government for the costs of construction allocable to those benefits.

Flood control protection is only one of a great many unreimbursed benefits conferred by the federal government upon the people, the property owners and the business activities of the country. Navigational aids for surface vessels and air lines and river and harbor improvements are but a few examples. Congress has never decreed that the recipient of any such benefit must substantially reduce his business activities (*i.e.*, dispose of his "excess acreage") as a condition for receiving such benefit.

In short, there has been no "windfall" in this case or in any other case where farmers prepay only the construction costs of a project allocable to irrigation, but receive other unreimbursed benefits.

Indeed, the notion of "windfall" now advanced by the Government was repudiated by Congress with respect to the very flood control project on the Kings River at issue here. The Pine Flat Dam was completed and placed in operation in 1954 and from that date until December 23, 1963, when the permanent contract with the Kings River water users was executed, the water users stored their water in the Pine Flat Reservoir under annual "interim" contracts with the Bureau of Reclamation. Under each of those contracts the water users were required to pay a fixed fee of $1.50 for each acre-foot of water stored by them in the reservoir each year. That fixed fee very substantially exceeded the portion of operating costs of the dam and reservoir project allocable to the storage of the irrigation water.

Commencing with the year 1956, each of the annual contracts provided that if and when a permanent contract should be executed (as was done in 1963), the excess of the annual payments over the allocated operating costs would be credited to the water users as a part-payment of their obligation to reimburse the United States for the portion ($14,250,000) of the cost of constructing the project allocated to irrigation benefits.

The water users applied to Congress for a similar credit for the payments made for the years 1954 and 1955. In its report (Senate Report 837, 90th Cong., 1st Sess., dated December 5, 1967) recommending approval of S. 2402 which

required the Secretary of the Interior to make the requested credit (in the amount of $1,098,597.92) as a reduction of the balance due from the Kings River water users upon their $14,250,000 capital reimbursements obligation, the Senate Committee on Interior and Insular Affairs said:

> "Without the credit provided for in this bill, the water users would be required to repay not the agreed sum of $14,250,000 but an amount of $15,348,597.92. This was not contemplated by either the Government or the water users and would be an *unjust enrichment* to the United States." (Emphasis supplied.)

Congress passed the bill and President Johnson signed it (Public Law 90-260, approved March 2, 1968, 82 Stat. 39).

Thus, whatever the Government's position today on the issue of "windfall," Congress in 1967 recognized that there would be "unjust enrichment" to the United States if it required payment from the Kings River water users which exceeded the costs of the project allocable to irrigation benefits.

The contrary notion intimated by the Court of Appeals opinion and advanced by the Government embodies a very substantial expansion of federal limitations imposed as the price of receiving flood control benefits. Surely, such an expansion of federally-imposed limitations presents a question of vast national importance to landowners in the service areas of virtually every federal flood control project in the nation.

Any further discussion of the merits of the complicated legal issues of this case would unduly lengthen this reply brief.

We may say, in summary, that despite the Government's efforts to suggest that the controversy here is of a localized

nature and that the issues decided by the Ninth Circuit were "narrow" and require no further review by this Court, the fact is that the issues raised by this litigation are of the utmost importance to the owners and operators of vast areas of highly-productive agricultural land, not only in California, but in many other parts of the United States.

After thirteen years of "test litigation", the time is now ripe, we respectfully suggest, for those issues to be decided by this Court.

Conclusion

For the foregoing reasons, this Court should grant a writ of certiorari to review the decision below.

Respectfully submitted,

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APPENDICES

A—Government Prepared List of All Reclamation Projects Authorized for Construction Through January 2, 1971

(Reproduced herein at pages A1 to A3.)

B—List of Flood Control Projects Authorized by the Flood Control Act of 1944

(Printed herein at pages B1 to B2.)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Reclamation

PROJECT AUTHORIZED FOR CONSTRUCTION
Through January 2, 1971

A 1

APPENDIX A

NUMBER	PROJECT	STATE	FIRST AUTHORIZATION		STATUS IN FISCAL YEAR 1971
			Date	Authority	
	(All-American Canal System)	Ariz.-Calif.	Dec. 21, 1928	Congress	Part of Boulder Canyon Project.
1	Amistad	Texas	Dec. 23, 1961	Congress	Operated by IBWC. USBR -- sale of energy only.
2*	Angostura	South Dakota	March 6, 1941	President	Constructed under Missouri River Basin.
3	Animas-La Plata, CRS Participating	Colo.-N. Mex.	Sept. 30, 1968	Congress	Advance Planning.
4	Arbuckle	Oklahoma	Aug. 24, 1962	Congress	Operated by Water Users.
5	Arnold	Oregon	July 25, 1947	Congress	Operated by Water Users.
6	Avondale	Idaho	July 31, 1953	Congress	Operated by Water Users.
7	Baker	Oregon	March 13, 1931	President	Operated by Water Users.
	Upper Division	Oregon	Sept. 27, 1962	Congress	Operated by Water Users.
8	Balmorhea	Texas	April 15, 1944	President	Operated by Water Users.
9	Belle Fourche	South Dakota	May 10, 1904	Secretary	Operated by Water Users.
10*	Bismarck (original)	North Dakota	Nov. 23, 1904	Secretary	Secondary, November 16, 1905.
11	Bitter Root	Montana	July 5, 1939	Congress	Operated by Water Users.
12*	Bitterroot Valley, Woodside	Montana	March 22, 1944	President	Water Conservation and Utility -- not constructed.
13	Boise (Payette-Boise Project)	Idaho-Oregon	March 27, 1905	Secretary	Operated by United States and Water Users.
14	Bostwick Park, CRS Participating	Colorado	Sept. 2, 1964	Congress	Construction.
15	Boulder Canyon:				
	All-American Canal System	Ariz.-Calif.	Dec. 21, 1928	Congress	Operated by U.S. and Water Users, DBMC, BAB.
	Hoover Dam and Powerplant	Arizona-Nevada	Dec. 21, 1928	Congress	Operated by United States and Agents, DBMC.
	Boulder City	Nevada	Sept. 2, 1959	Congress	Municipality established.
16	Buffalo Rapids:				
	First Division	Montana	Sept. 27, 1937	President	Operated by Water Users, DBMC.
	Second Division	Montana	Oct. 13, 1939	President	Operated by Water Users, DBMC.
*	Buford-Trenton (old)	North Dakota	Nov. 15, 1904	Secretary	Abandoned May 26, 1926.
17	Buford-Trenton (new)	North Dakota	Sept. 23, 1959	President	Operated by Water Users.
18	Burnt River	Oregon	Sept. 25, 1919	Secretary	Operated by Water Users.
19	Cachuma (Santa Barbara)	California	March 4, 1948	Secretary	Operated by United States and Water Users.
20	Canadian River	Texas	Dec. 29, 1950	Congress	Operated by Water Users, DBMC.
21	Carlsbad	New Mexico	Nov. 28, 1905	Secretary	Operated by United States and Water Users, BAB.
22	Central Arizona	Ariz.-N. Mex.	Sept. 30, 1968	Congress	Advance Planning. Construction deferred to 1973.
	Navajo Participating Agreement	Ariz.-N. Mex.	Sept. 30, 1968	Congress	Construction under contract authority.
23	Central Utah, CRS Part. Initial phase	Utah	April 11, 1956	Congress	Construction. Vernal Unit -- operated by Water Users, DBMC.
	Uintah Unit	Utah	Sept. 30, 1968	Congress	Provisional authorization.
24	Central Valley	California	Dec. 2, 1935	President	Construction. Operated by U. S. and Water Users.
	Folsom and Sly Park Units	California	Oct. 14, 1949	Congress	Operated by United States and Water Users.
	Sacramento Canals Unit	California	Sept. 26, 1950	Congress	Construction. Operated by United States.
	Trinity River Division	California	Aug. 12, 1955	Congress	Construction. Operated by United States.
	San Luis Unit	California	June 3, 1960	Congress	Construction. Operated by U. S. and Water Users.
	(New Melones Project)	California	Oct. 23, 1962	Congress	Authorized USCE and USBR.
	Auburn-Folsom South Unit	California	Sept. 2, 1965	Congress	Construction.
	(Marysville Dam and Reservoir)	California	Nov. 7, 1966	Congress	Authorized USCE and USBR.
	San Felipe Division	California	Aug. 27, 1967	Congress	Advance Planning.
25	Chief Joseph Dam:				
	Foster Creek Division	Washington	July 27, 1954	Congress	Operated by Water Users, DBMC.
	Greater Wenatchee Division	Washington	May 5, 1958	Congress	Operated by United States.
	Okanogan-Similkameen Division:				
	Oroville-Tonasket Unit	Washington	Oct. 9, 1962	Congress	Operated by Water Users, DBMC.
	Whitestone Coulee Unit	Washington	Sept. 30, 1968	Congress	Construction.
	Chelan Division, Manson Unit	Washington	Sept. 7, 1966	Congress	Construction.
26	Collbran	Colorado	July 3, 1952	Congress	Operated by United States and Water Users.
27	Colorado-Big Thompson	Colorado	Dec. 21, 1937	President	Operated by United States and Water Users.
28	Colorado River	Texas	Aug. 26, 1937	Congress	Operated by Water Users.
29	Colorado R. Front Work & Levee System	Ariz.-Calif.-Nev.	July 1, 1940	Congress	Construction. Operated by United States.
30	Colorado River Storage	5 States	April 11, 1956	Congress	Construction and DBMC. Operated by United States.
31	Columbia Basin	Washington	Aug. 30, 1935	Congress	Construction. Operated by U. S. and Water Users.
	Coulee Dam Community	Washington	Aug. 30, 1957	Congress	Municipality established.
	Third Powerplant	Washington	June 14, 1966	Congress	Construction.
32	Crescent Lake Dam	Oregon	July 1, 1954	Congress	Operated by Water Users.
33	Crooked River	Oregon	Aug. 6, 1956	Congress	Operated by Water Users.
34	Dallas Creek, CRS Participating	Colorado	Sept. 30, 1968	Congress	Advance Planning.
35	Dalton Gardens	Idaho	July 31, 1953	Congress	Operated by Water Users.
	(Davis Dam) Parker-Davis	Arizona-Nevada	April 26, 1941	Secretary	Combined with Parker Dam May 28, 1954.
	(Delivery of Water to Mexico)	Arizona	May 17, 1963	Congress	Special activity. Supervision and control by United States, DBMC. Operated by U.S.
36	Deschutes	Oregon	Nov. 1, 1937	President	Operated by Water Users.
*	Dixie	Utah	Sept. 2, 1964	Congress	Drainage and Minor Construction
37	Dixie	Utah	Sept. 30, 1968	Congress	Reauthorized. Advance Planning.
38	Dolores, CRS Participating	Colorado	Sept. 30, 1968	Congress	Advance Planning.
39	Eden	Wyoming	Sept. 18, 1940	President	Operated by Water Users, DBMC.
40*	Eklutna	Alaska	July 31, 1950	Congress	Transferred to Alaska Power Administration, June 16, 1967.
41	Emery County, CRS Participating	Utah	April 11, 1956	Congress	Operated by Water Users, DBMC.
42	Falcon	Texas	June 18, 1954	Congress	Operated by IBWC. USBR -- sale of energy only.
43	Florida, CRS Participating	Colorado	April 11, 1956	Congress	Operated by Water Users.
44	Fort Peck	Mont.-N. Dak.	May 18, 1938	Congress	Operated by United States.
45	Fort Sumner	New Mexico	July 30, 1949	Congress	Operated by Water Users.
46	Frenchtown	Montana	Sept. 21, 1935	President	Operated by Water Users.

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Appendix A

PROJECTS AUTHORIZED FOR CONSTRUCTION
Through January 2, 1971

NUMBER	PROJECT	STATE	FIRST AUTHORIZATION		STATUS IN FISCAL YEAR 1971
			Date	Authority	
47	Fruitgrowers Dam	Colorado	Jan. 11, 1938	President	Operated by Water Users.
48	Fruitland Mesa, CRS Participating	Colorado	Sept. 2, 1964	Congress	Advance Planning. P&MC deferred to 1972.
49	Fryingpan-Arkansas	Colorado	Aug. 16, 1962	Congress	Construction. Operated by United States.
50*	Garden City	Kansas	Oct. 5, 1905	Secretary	Abandoned June 5, 1930.
51	Gila	Arizona	June 25, 1937	President	Operated by United States and Water Users, P&MC.
52	Grand Valley	Colorado	Jan. 5, 1911	President	Operated by Water Users.
53	Grants Pass	Oregon	Oct. 12, 1949	Congress	Operated by Water Users.
54	Hammond, CRS Participating	New Mexico	April 11, 1956	Congress	Operated by United States, P&MC.
55*	Hondo	New Mexico	Nov. 10, 1903	Secretary	Abandoned April 1, 1917.
	(Hoover Dam and Powerplant)	Arizona-Nevada	Dec. 21, 1928	Congress	Part of Boulder Canyon Project.
56	Humboldt	Nevada	Nov. 6, 1935	President	Operated by Water Users.
57	Hungry Horse	Montana	June 5, 1944	Congress	Operated by United States.
58	Huntley	Montana	April 18, 1905	Secretary	Operated by Water Users.
59	Hyrum (Salt Lake Basin)	Utah	Nov. 6, 1935	President	Operated by Water Users.
	(Imperial Dam and Desilting Works)	Ariz.-Calif.	Dec. 21, 1928	Congress	Part of Gila and All-American Canal System.
60	Intake	Montana	Jan. 20, 1944	President	Operated by Water Users.
61	Kendrick	Wyoming	Aug. 30, 1935	President	Operated by United States and Water Users, P&MC.
62*	Kennewick Highlands	Washington	March 7, 1911	President	Superseded by Yakima, Kennewick Division.
63*	King Hill	Idaho	June 12, 1917	Congress	Abandoned September 28, 1934.
64*	Kings River	California	Jan. 24, 1940	Secretary	Superseded by USCE authorization.
65	Klamath	Oregon-California	May 15, 1905	Secretary	Operated by U.S. and Water Users, P&MC, R&B.
66*	La Barge, CRS Participating	Wyoming	April 11, 1956	Congress	Authorized. Construction deferred.
67*	Lawton	Oklahoma	Oct. 8, 1914	President	Suspended June 1, 1917.
68	Lewiston Orchards	Idaho	July 31, 1946	Congress	Operated by Water Users.
69	Little Wood River	Idaho	Aug. 6, 1956	Congress	Operated by Water Users.
70	Lower Rio Grande:				
	Harlingen Division	Texas	April 7, 1948	Congress	Operated by Water Users.
	La Feria Division	Texas	Sept. 22, 1959	Congress	Operated by Water Users.
71	Lower Yellowstone (Fort Buford)	Mont.-N. Dak.	May 10, 1904	Secretary	Operated by Water Users.
72	Lyman, CRS Participating	Wyoming-Utah	April 11, 1956	Congress	Construction.
73*	Malheur	Oregon	May 11, 1904	Secretary	Rescinded February 10, 1926.
74	Manassa	Colorado	Oct. 24, 1940	President	Operated by Water Users.
*	Mann Creek	Idaho	July 7, 1941	President	Discontinued.
75	Mann Creek	Idaho	Aug. 16, 1962	Congress	Operated by Water Users.
76	McClellan Delta	New Mexico	Feb. 20, 1958	Congress	Salinity alleviation.
77	Midland Flats	Idaho	Aug. 31, 1954	Congress	Operated by Water Users, P&MC.
78	Middle Rio Grande	New Mexico	May 17, 1950	Congress	Operated by United States.
79	Milk River	Montana	March 14, 1903	Secretary	Operated by United States and Water Users.
80	Minidoka	Idaho-Wyoming	April 23, 1904	Secretary	Operated by United States and Water Users.
81	Mirage Flats	Nebraska	April 26, 1940	President	Operated by Water Users.
82	Missoula Valley	Montana	May 10, 1944	President	Operated by Water Users.
83	Missouri River Basin	10 States	Dec. 22, 1944	Congress	Construction and P&MC. Operated by United States and Water Users.
	Garrison Diversion Unit	N. Dak.-S. Dak.	Aug. 5, 1965	Congress	Construction.
	Nebraska Mid-State Division	Nebraska	Nov. 14, 1967	Congress	Advance Planning.
	Oahe Unit, James Division	South Dakota	Aug. 3, 1968	Congress	Advance Planning.
84	Moon Lake	Utah	Nov. 6, 1935	President	Operated by Water Users.
	(Navajo Indian Irrigation, CRS Part.)	New Mexico	June 13, 1962	Congress	Indian Project. Construction by USBR.
85	Mountain Park	Oklahoma	Sept. 21, 1968	Congress	Construction.
86*	Nacon	North Dakota	Jan. 23, 1906	Secretary	Secondary. Now in Missouri River Basin.
87	Newlands	Nevada-California	March 14, 1903	Secretary	Operated by Water Users, R&B.
88	Norton	Utah	Oct. 17, 1940	President	Operated by Water Users.
89	Norman	Oklahoma	June 27, 1960	Congress	Operated by Water Users.
90	North Platte (Pumpatester)	Wyoming-Nebraska	March 14, 1903	Secretary	Operated by United States and Water Users.
	(Oshoco)	Oregon	June 29, 1948	Congress	Combined with Crooked River, August 6, 1956.
91	Ogden River	Utah	Nov. 16, 1935	President	Operated by Water Users.
92	Okanogan	Washington	Dec. 2, 1905	Secretary	Operated by Water Users.
93	Orland	California	Oct. 5, 1907	Secretary	Operated by Water Users.
94	Owyhee	Oregon-Idaho	Oct. 12, 1926	President	Operated by Water Users.
95	Pacific Northwest-Southwest Intertie	Ariz.-Calif.-Nev.	Aug. 31, 1964	Congress	Construction. Operated by United States.
96	Palisades	Idaho-Wyoming	Dec. 9, 1941	Secretary	Operated by U. S. Reauthorized Sept. 30, 1950.
97	Palmetto Bend	Texas	Oct. 12, 1968	Congress	Advance Planning.
98	Palo Verde	Calif.-Ariz.	Aug. 31, 1954	Congress	Operated by Water Users.
99	Paonia, CRS Participating	Colorado	March 18, 1939	President	Operated by Water Users.
	(Parker Dam Power) Parker-Davis	Ariz.-Calif.	Aug. 30, 1935	Congress	Combined with Davis Dam May 28, 1954.
100	Parker-Davis	Ariz.-Calif.-Nev.	May 28, 1954	Congress	Operated by United States, P&MC.
101	Pecos River Basin Water Salvage	New Mexico-Texas	Sept. 12, 1958	Congress	Operated by United States, P&MC.
102	Pine River	Colorado	June 17, 1937	President	Operated by United States and Water Users.
*	Pine River Extension, CRS Part.	Colo.-N. Mex.	April 11, 1956	Congress	Deauthorized, September 30, 1968.
103	Preston Bench	Idaho	June 15, 1948	Congress	Operated by Water Users.
104	Provo River	Utah	Nov. 16, 1935	President	Operated by Water Users.
105	Rapid Valley	South Dakota	Nov. 8, 1939	President	Operated by United States and Water Users.
106	Rathdrum Prairie:				
	Post Falls Unit	Idaho	Jan. 29, 1944	President	Operated by Water Users.
	Hayden Lake Unit	Idaho	June 9, 1947	Secretary	Operated by Water Users.
	East Greenacres Unit	Idaho	June 23, 1970	Congress	Authorized.
107*	Red Bluff	Texas	June 18, 1926	Congress	WPA -- built and operated by Water Users.
	(Kirie)	Idaho	Oct. 23, 1962	Congress	Advanced Planning. USCE project.
108	Rio Grande	N. Mex.-Texas	Dec. 2, 1905	Secretary	Operated by United States.
109*	Riverton	Wyoming	June 5, 1920	Congress	Operated by United States and Water Users. Reauthorized Sept. 25, 1970 as part of Missouri River Basin project.
110	Rogue River Basin:				
	Medford and Rogue R. Valley I.D.'s.	Oregon	Aug. 20, 1954	Congress	Operated by Water Users. R&B,non-federal funds.
	Talent Division	Oregon	Aug. 20, 1954	Congress	Operated by United States and Water Users.
	Eagle Division	Oregon	May 20, 1970	Congress	Authorized.
111	Salt River	Arizona	March 14, 1903	Secretary	Operated by Water Users, R&B.

Appendix A

PROJECTS AUTHORIZED FOR CONSTRUCTION
Through January 2, 1971

NUMBER	PROJECT	STATE	FIRST AUTHORIZATION		STATUS IN FISCAL YEAR 1971
			Date	Authority	
112	San Angelo	Texas	Aug. 16, 1957	Congress	Operated by Water Users, D&MC.
	(San Diego)	California	Nov. 29, 1944	President	Constructed for Navy Department. Operated by Water Users.
113	San Juan-Chama, CRS Participating, Initial Phase	Colo.-N. Mex.	June 13, 1962	Congress	Construction.
*	San Luis Valley	Colorado	[illegible] 1, 1940	Secretary	Reconstruction started.
114	Fluoro Reservoir	Colorado	March 21, 1949	Secretary	Operated by United States and Water Users.
115	San Miguel, CRS Participating	Colorado	Sept. 30, 1968	Congress	Advance planning deferred to 1972.
116	Sanpete	Utah	Nov. 5, 1935	President	Operated by Water Users.
117*	Santa Margarita	California	July 28, 1954	Congress	Not yet under construction.
118	Santa Maria	California	Sept. 3, 1954	Congress	Operated by Water Users.
	(Savage Rapids Dam) Grants Pass	Oregon	July 9, 1952	Congress	Part of Grants Pass Project.
119	Savery-Pot Hook, CRS Participating	Colorado-Wyoming	Sept. 2, 1964	Congress	Advance Planning.
120	Scofield	Utah	June 28, 1943	President	Operated by Water Users.
121	Seminoe, CRS Participating	Wyoming	April 11, 1956	Congress	Operated by United States, D&MC.
122	Shoshone	Wyoming-Montana	Feb. 10, 1904	Secretary	Operated by U. S. and Water Users. R&B deferred to 1972.
123	Silt, CRS Participating	Colorado	April 11, 1956	Congress	Operated by Water Users, D&MC.
124	Smith Fork, CRS Participating	Colorado	April 11, 1956	Congress	Operated by Water Users.
	(Snettisham, Crater-Long Lake: Div.)	Alaska	Oct. 23, 1962	Congress	Transferred to Alaska Power Administration, June 16, 1967.
125	Solano	California	Nov. 11, 1948	Secretary	Operated by United States and Water Users, D&MC.
126	Southern Nevada Water	Nevada	Oct. 20, 1965	Congress	Construction.
127	Spokane Valley	Washington-Idaho	Sept. 16, 1959	Congress	Operated by Water Users.
128	Strawberry Valley	Utah	Dec. 15, 1905	Secretary	Operated by Water Users.
129	Sun River	Montana	Feb. 26, 1906	Secretary	Operated by Water Users.
130	Teton Basin, Lower Teton Division	Idaho	Sept. 7, 1964	Congress	Construction.
131	The Dalles, Western Division	Oregon	Sept. 13, 1960	Congress	Operated by Water Users.
132	Truckee Storage	Nevada-California	Sept. 21, 1935	President	Operated by Water Users.
133	Tualatin	Oregon	Sept. 20, 1966	Congress	Construction.
134	Tucumcari (Arch Hurley)	New Mexico	Aug. 7, 1937	Congress	Operated by Water Users, R&B.
135	Umatilla	Oregon	Dec. 4, 1905	Secretary	Operated by U.S. and Water Users. R&B deferred to 1972.
136	Uncompahgre (Gunnison)	Colorado	March 14, 1901	Secretary	Operated by Water Users, R&B.
137	Vale	Oregon	Oct. 21, 1926	President	Operated by Water Users.
138	Valley Gravity	Texas	June 28, 1941	Congress	Construction not undertaken.
139	Ventura River	California	March 1, 1956	Congress	Operated by Water Users.
140	Vernon	New Mexico	Sept. 27, 1950	Congress	Operated by Water Users.
141	W. C. Austin (Lugert-Altus)	Oklahoma	June 20, 1938	Congress	Operated by United States and Water Users.
142	Wapinitia, Juniper Division	Oregon	June 4, 1954	Congress	Operated by Water Users.
143	Washita Basin	Oklahoma	Feb. 25, 1950	Congress	Operated by Water Users, D&MC.
144	Washoe	Nevada-California	Aug. 1, 1956	Congress	Operated by United States, D&MC.
145	Weber Basin	Utah	Aug. 29, 1949	Congress	Operated by United States and Water Users, D&MC.
146	Weber River (Salt Lake Basin)	Utah	Jan. 8, 1927	President	Operated by Water Users.
147	West Divide, CRS Participating	Colorado	Sept. 30, 1968	Congress	Authorized.
148	Wichita, Cheney Division	Kansas	Sept. 14, 1960	Congress	Operated by Water Users, D&MC.
149	Williston	North Dakota	Jan. 23, 1906	Secretary	Abandoned May 20, 1926.
	(Willow Creek)	Oregon	Oct. 27, 1965	Congress	Advance Planning. USCE project.
150	Yakima	Washington	Dec. 12, 1905	Secretary	Operated by United States and Water Users, R&B.
	Roza-Sevick Division Extension	Washington	Aug. 28, 1969	Congress	Authorized.
151	Yuma	Ariz.-Calif.	May 10, 1904	Secretary	Operated by United States and Water Users.
152	Yuma Auxiliary	Arizona	Jan. 25, 1917	Congress	Operated by Water Users.
	FISCAL YEAR 1971				
153	Walla Walla, Tourist Division	Oregon-Wash.	July 7, 1970	Congress	Authorized.
	Missouri River Basin:				
	Narrows Unit	Colorado	Aug. 26, 1970	Congress	Authorized.
	Minot Extension, Garrison Diversion Unit	N. Dakota	Sept. 25, 1970	Congress	Construction deferred to 1972.
	Riverton Unit	Wyoming	Sept. 25, 1970	Congress	Authorized. Includes Riverton project.
	Central Valley:				
	Black Butte project	California	Oct. 21, 1970	Congress	Constructed and Operation -- USCE.

Notes.-- 1. Except as noted by parentheses, this list includes as numbered items all original authorizations for construction by the Bureau of Reclamation, or Reclamation Service, with the date and source of the original authorization. Re-authorization or additional authorizations for the same project are not included except for reference for current progress. Where projects have been authorized by more than one method; i.e., Secretary or President or Act of Congress, only the first or earliest method is shown. Where a project has been reauthorized, with all construction performed under the subsequent reauthorization, the original authorization is shown. Included are some projects (*) on which no construction has been actually performed. Projects or works constructed for other agencies under the Economy Act, for which there is no direct authorization to the Bureau of Reclamation, are not included.

2. Parentheses indicate names of project divisions which are tabulated elsewhere in listing and projects constructed for or by other agencies.

D&MC - Drainage and Minor Construction
R&B - Rehabilitation and Betterment
CRS - Colorado River Storage

*Inactive, abandoned or deferred construction projects (19).

APPENDIX B

Projects Authorized by the Flood Control Act of 1944

	State	*Projects*
1.	Arkansas	Lower Mississippi River projects Red-Ouachita River Basin projects Arkansas River Basin projects
2.	Arizona	Colorado River Basin projects
3.	California	San Diego River Basin projects Ventura River Basin projects Santa Ana River Basin projects Los Angeles-San Gabriel Basin projects Pajaro River Basin projects Sacramento-San Joaquin River Basin projects [including the Kings River project] Napa River Basin projects
4.	Colorado	Arkansas River Basin projects Missouri River Basin projects Rio Grande Basin projects
5.	Connecticut	Connecticut River Basin projects Housatonic River Basin projects
6.	Georgia	Savannah River Basin projects Mobile River Basin projects
7.	Hawaii	Hanapepe River projects
8.	Idaho	Columbia River Basin projects
9.	Illinois	Upper Mississippi Basin projects
10.	Indiana	Ohio River Basin projects
11.	Iowa	Upper Mississippi River Basin projects Missouri River Basin projects
12.	Kansas	Missouri River Basin projects
13.	Kentucky	Ohio River Basin projects

Appendix B

State	*Projects*
14. Louisiana	**Lower Mississippi River projects** **Red-Ouachita River Basin projects**
15. Massachusetts	**Blackstone River Basin projects**
16. Minnesota	**Red River projects**
17. Mississippi	**Lower Mississippi River projects**
18. Missouri	**Upper Mississippi River Basin projects** **Missouri River Basin projects**
19. Montana	**Missouri River Basin projects**
20. New York	**Great Lakes Basin projects**
21. North Carolina	**Roanoke River Basin projects**
22. North Dakota	**Red River projects** **Missouri River Basin projects**
23. Ohio	**Ohio River Basin projects**
24. Oregon	**Coquille River Basin projects** **Nehalem River Basin projects** **Columbia River Basin projects**
25. Pennsylvania	**Susquehanna River Basin projects** **Ohio River Basin projects**
26. Rhode Island	**Seekonk River projects**
27. South Carolina	**Edisto River Basin projects** **Savannah River Basin projects**
28. Texas	**Colorado River Basin projects** **Brazos River Basin projects**
29. Utah	**Great Salt Basin projects**
30. Vermont	**Winooski River Basin projects** **Connecticut River Basin projects**
31. Virginia	**Roanoke River Basin projects**
32. Washington	**Columbia River Basin projects** **Willapa River Basin projects** **Chehalis River Basin projects**

MOTION FILED
DEC 6 1976

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

Nos. 76-554, 555

TULARE LAKE CANAL COMPANY and TULARE LAKE BASIN WATER STORAGE DISTRICT,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

SALYER LAND COMPANY, a corporation,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE
and
BRIEF OF BEN YELLEN AND OTHERS, AMICI CURIAE IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Ben Yellen, Harry A. Heath, Frances Heath, Rufina T. Lira, Willie Bronson, H. C. Phillips, Juan Alonso Lira, Manuel Valdiva, Genaro Cuen, Apolinar Gloria, L. M. Menor, Alejo Cortez, Henry Marquez, Maria Marquez, Estala Otero, Juan Sentejas, Alli Slali, Jose Del Real, Jose Gognez, Alex Rodriguez,

Alex Villegas, Sr., John McBailey, Victor Castello, Crescencio Rubio, Robert Majexo, Joe Parra, Wilma Sellers, Marie Eaton, John H. Smith, Albert L. Couch, Frank Eppinger, Margarita Carmelo, Troy W. Sparks, Andy Schrock, Sam L. Gafford, George H. Green, Matilda Fierro, Maria Muevaz, Eugene Nelson, Baldomero Saiza, Benjamin R. Luna, Jr., Jennie Saiza, Felicia Escalera, Anita Lopez, Mrs. Glen Powell, Glen Powell, Josefina Penunuri, Eugenio Ponce, Ruth Valdivia, Juana Padilla, Zoila Viloria, Joaquin Padilla, Juana Ortega, Belle Green, Ruth Hernandez Romero, Mary Araugo, Dolores Martinez, Mike W. Kelley, Carl McLemore, Jose M. Rosales, Isabel Soto, Charles A. Jennings, Barney A. Bean, Pat A. Dean, Cecil Lee Kelley, Mary Guerrero, Joe Ragsdale, Pablo Diaz, June Chambless, Charles E. Perez, Salome S. Perez, Carl R. Grimsley, Junior Robinson, Richard Cheatwood, Mrs. Cruz Limon, Benito Bustamante, Manuel Arauja, Fernando T. Bartido, Albert Armstrong, Laura Jones, Mike Miranda, Marguerite Johnson, Margarita P. Morales, Eva Torres, Mary Villegas, Macario F. Pacheco, Evelyn A. Lloyd, Annie L. Campbell, Grace Duran, Pacundo Madueno, Guadelupe Madueno, Mary Leon, Teresa Arias, Claudian Cocova, Delfina Guebara, Luisa Ramirez, Faustina Rosalez, Petra Medina, Concepcion Settle, Isabel Teniente, Frank O. B. Adams, Palmida Perez, Nellie Rodriguez, Mary Curiel, Johnnie Townsend, Tillie Rodriguez, Jorge Moreno, William Gorham, H. K. Hutchinson, Bertha J. Hutchinson, Obdulia Davila, Lupe Casteneda, Adelaido R. Pasquez, Jr., Ernestina Vasquez, Martha P. Tabarez, Florine

Jones, Henry Clay Pickles, Viola Grimsley, Ida K. Paddock, Pedro Escalera, Olivia Marquez, Cecilia Sandoval and Ygnacio Salazar move the Court for an order permitting them to file the within brief in opposition to the pending petitions for writs of certiorari.

The Solicitor General has consented to the filing of the brief. Petitioners' counsel have declined to consent to the filing of the brief but have stated they do not intend at this time to oppose its filing.

INTEREST OF AMICI

Amici filed a brief amici curiae in the Court of Appeals with the permission of that Court in the present case. Amici had advised the Court of Appeals that the Government did not cite all available authority in its briefs and the Court apparently agreed, for it granted permission to file the brief of Amici *after* oral argument and *after* the case had been taken under submission for decision. Many of the authorities brought to the attention of the Court of Appeals by Amici, not presented by the Government, were cited by the Court of Appeals in its opinion.

Amici are persons who are desirous of purchasing excess lands irrigated by federal reclamation water which would become available for purchase at ex-contract prices. Amici are parties to other litigation involving similar issues as those raised in this case.

Amici believe the brief they propose to file in this case may be of assistance to this Court as their earlier brief was of assistance to the Court of Appeals.

BRIEF OF BEN YELLEN AND OTHERS, AMICI CURIAE IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

---

QUESTIONS PRESENTED

1. Whether or not §8 of the Flood Control Act of 1944[1] requires the application of federal reclamation law,[2] including the 160 acre limitation of §46 of the Omnibus Adjustment Act,[3] to projects providing irrigation benefits, including the Kings River service area of the Pine Flat Dam in California.

2. Whether or not the advance repayment to the Government of the costs of constructing the project, referred to as "payout", relieves those landowners receiving irrigation benefits for more than 160 acres from the requirement of executing recordable contracts with the Secretary of the Interior, as required by federal reclamation law.

STATEMENT

The opinion of the Court of Appeals authored by Chief Judge Browning was joined by Circuit Judges Duniway and Wallace. The panel hearing and deciding the case denied petitions for rehearing and rejected the suggestions for a rehearing en banc. The

[1]Act of Dec. 22, 1944, ch. 665, 58 Stat. 887, 43 U.S.C. §390.

[2]Act of June 17, 1902, 32 Stat. 388 and Acts amendatory or supplementary thereto, 43 U.S.C. §371 et seq.

[3]Act of May 25, 1926, ch. 383, 44 Stat. 649, 43 U.S.C. §423e. Section 46 of the 1926 Act is a substantial reenactment of §5 of the original 1902 Act, 32 Stat. 389, 43 U.S.C. §431. *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 277-278 n.2 (1958).

full court was advised of the suggestions for en banc rehearings. Not a single judge of the Ninth Circuit, encompassing the Western states most intimately concerned and affected by the decision, requested a vote on the suggestion for rehearing en banc. 535 F.2d at 1144; Fed. R. App. P. 35(b). Among the circuit judges in regular active service are six from the State of California, including two of the judges on the panel (Judges Duniway and Wallace) which heard and decided the case. We call this Court's attention to the geographical representation on the Ninth Circuit only because of the unsupported charges by petitioners that the decision under review will result in ". . . the economic devastation of an important agricultural community in the United States".[3a]

The Reclamation Act, originally enacted in 1902 and supplemented on numerous occasions thereafter, provides in general for the construction and operation by the Government of various dams and appurtenant facilities for the purpose of storing, conserving and regulating the supply of water in the Western states. Although couched in terms which appear to limit its application to the "re-claiming" of arid public lands, privately owned lands having privately developed means of irrigation have been brought into reclamation projects almost from the beginning of the reclamation program in 1902.[4]

Reclamation projects generally serve multiple purposes such as flood control, recreation, protection of

[3a]Tulare Pet. 39.

[4]*Ivanhoe Irrig. Dist. v. McCracken, supra*, 357 U.S. at 283. The Court of Appeals in the present case made a similar observation, citing *Ivanhoe* and other authority. 535 F.2d at 1112.

fish and wildlife, and irrigation. The proportionate costs of constructing a project attributable to irrigation are repaid to the Government over a period of 40 years interest free. In general, repayment today is by state or quasi-state agencies such as irrigation or water districts which in turn pass on these repayment costs to the owners of land who receive benefits from the project.

The history and purpose of the Reclamation Act is summarized in Sax, *Federal Reclamation Law,* §§110-118.4 (pp. 113-191), II Waters and Water Rights (Clark ed. 1967). Additional background is found in Gates, *Reclamation of the Arid Lands,* History of Public Land Law Development, ch. XIII (pp. 635-698), (Public Land Law Commission, U.S. Govt. Printing Office, 1968).

The history and purpose of the 160 acre limitation, sometimes referred to as "the excess land law", is summarized in *Sax, supra,* §120.1 (pp. 210-214) and Taylor, *The Excess Land Law: Execution of a Public Policy,* 64 Yale L.J. 477 (1955).

The Court of Appeals determined that reclamation law applied to such projects as the Pine Flat Dam, having irrigation benefits although constructed under the authority of the Flood Control Act. It also held that advance repayment of construction costs does not relieve private landowners of the necessity to comply with §46 of the Omnibus Adjustment Act by executing recordable contracts as a condition to the receipt of project water for their "excess lands", i.e., those in excess of 160 acres held in individual ownership.

ARGUMENT

When the Flood Control Act of 1944 was before Congress, opponents of applying reclamation law argued as follows: the dominant need for Pine Flat Dam was flood control; private irrigation facilities were in existence; the water of the King's River had been appropriated; and the project would bring no additional arid land under irrigation. These arguments for an exemption from reclamation law were rejected by Congress. 535 F.2d at 1111-1113. In 1950 and 1951, bills were introduced to relieve landowners of the Kings River service area of acreage limitation in return for a lump sum payment of construction costs. Neither bill passed. 535 F.2d at 1139. Petitioners urge the very arguments rejected by Congress as their basis for review. They have now advanced an additional contention that application of the law would be unfeasible. As noted by the Court of Appeals, opposition to the application of reclamation law was not based on the feasibility argument that family farms could not succeed, and there is no indication that either Congress or the Department of the Interior believed this to be true. 535 F.2d at 1114, n.7.

This Court has articulated a rule of statutory construction in the area of federal reclamation law. When confronted with efforts, as here, to imply an exemption from the 160 acre limitation for a particular project, the Court declined and held:

> "Significantly, where a particular project has been exempted because of its peculiar circumstances, the Congress has always made such ex-

emption by express enactment." *Ivanhoe Irrig. Dist. v. McCracken, supra,* 357 U.S. at 292, relied on by the Court of Appeals at 535 F.2d at 1099.[5]

Petitioners are seeking to have this Court infer from the statute the very exemption Congress refused to provide during the legislative process. The rule of *Ivanhoe Irrig. Dist. v. McCracken,* enunciated by a unanimous Court less than 20 years ago, is entitled

[5]This Court's reasoning is not subject to challenge. Where special circumstances exist, Congress has specifically provided for exemptions from "the excess-land provisions of the Federal reclamation laws". See Act of June 27, 1952, 66 Stat. 282 (San Luis Valley Project, Colorado):

"The excess-land provisions of the Federal reclamation laws shall not be applicable to lands or to the ownership of lands which receive a supplemental or regulated supply of water from the San Luis Valley project, Colorado: . . ."

The Act of July 24, 1957, 71 Stat. 309 (Missouri River Basin, East Bench Unit) provides:

"Except as provided in section 2 of this Act, the excess land provisions of the Federal reclamation laws shall not apply to lands in the . . . of the East Bench unit of the Missouri River Basin project, . . . that are irrigated under existing State water rights, whether the waters used for their irrigation are passed through, regulated by, or stored in the Clark Canyon Reservoir by the United States."

The Act of April 7, 1958, 72 Stat. 82 (Lower Rio Grande Project, Mercedes Division) provides:

"The excess-land provisions of the Federal reclamation laws shall not be applicable to lands in this project which now have an irrigation water supply from sources other than a Federal reclamation project, and for which no new waters are being developed."

There are numerous other examples.

Act of June 16, 1938, 52 Stat. 764, 43 U.S.C. §386 (Colorado-Big Thompson Project); Act of November 29, 1940, 54 Stat. 1219 (Truckee River and Humboldt Projects); Act of August 28, 1954, 68 Stat. 390 (Owl Creek Unit, Missouri River Basin Project); Act of August 6, 1956, 70 Stat. 1044, 43 U.S.C. §422(f) (small reclamation projects); Act of September 4, 1957, 71 Stat. 608 (Kendrick Project); Act of December 22, 1959, 72 Stat. 641 (Lower Rio Grande Rehabilitation Project, La Feria Division); Act of October 1, 1962, 76 Stat. 677, 16 U.S.C. §835a (Columbia Basin Project).

to a longer life than that afforded by petitioners, who seek its abandonment. The Flood Control Act itself contains no clear exemption from acreage limitation, and under this Court's rule of statutory construction in *Ivanhoe,* none could be implied. Nevertheless, the Ninth Circuit carefully re-examined the legislative history in great detail to show that Congress did not intend to create a statutory exemption. 535 F.2d at 1099-1118. Petitioners make no serious effort to undermine the accuracy of the Court's recitation of the legislative history.

From the very beginning of their petitions and throughout, petitioners' purported statements of fact are, significantly, unaccompanied by supporting references to statutory, legislative, administrative or judicial materials. Contrary to the suggestions of petitioners, the Reclamation Act does not in any way limit *land* use, it merely limits the use of the federal subsidy of reclamation water. Petitioners fail to recognize that land ownership and water use have been separate throughout the history of the Western states in the lands "west of the hundredth meridian". By emphasizing *land* policy and underemphasizing *water* policy, petitioners tend to exploit their confusion to their own advantage. The implication of petitioners that they have some kind of moral claim to the stored and regulated waters of the Kings River is in complete disregard of the purposes and policies of the Reclamation Act and the conditions attached to the receipt of its benefits. The clear distinction between *land* ownership and *water*

use is illustrated in the commentary on the 160 acre limitation in Taylor, *supra,* 64 Yale L.J. 477-79. See also Graham, *The Central Valley Project, Resource Development of a Natural Basin,* 38 Calif. L. Rev. 588, 604 (1950):

> "The [160 acre] limitation neither legally nor factually is one on the ownership of land—it rather is one on the amount of the owned land which may *receive water from a federal reclamation project.* Nor does it go in any way, as is often asserted, toward regulating what a landowner does with whatever water supply he may already have." (emphasis from original)

Petitioners do not hesitate to dwell upon the fact that private land may be affected by implementation of the applicable law. Petitioners' suggestion that there may be a meaningful distinction between "public" and "private" lands in the context of reclamation law is misplaced. Nowhere in the legislative history of §46 of the Omnibus Adjustment Act or in any other provision of reclamation law is there a distinction between private and public lands or between lands that were previously developed with private resources or public funds. The Court of Appeals rejected any such distinction,[6] relying upon a report to President Coolidge by a special committee of advisors to devise means of improving the reclamation program, who were known as the "Fact Finders". This report, sometimes referred to as the "Fact Finders' Report",[7]

[6]535 F.2d at 1112.

[7]*Federal Reclamation by Irrigation,* S. Doc. No. 92, 68 Cong., 1st Sess. (1924).

makes it crystal clear that private lands have long constituted a major portion of the reclamation program.[8] The legislative history of the Fact Finders' Act,[9] adopting many of the recommendations from the Fact Finders' Report, clearly shows that lands developed privately were to be included within irrigation projects.[10] Section 46 generally followed the recommendation of the Fact Finders[11] and was the outgrowth of that report.

As far back as 1903, the First Annual Report of the Reclamation Service said:

> "Recognizing the fact that there is scarcely a section of the country in the United States, even in the most sparsely settled regions of the West, where an irrigation project would not involve the reclamation of lands in *private ownership,* as well as those belonging to the United States, this section [§5 of the 1902 Act, 32 Stat. 389, 43 U.S.C. §431] authorizes the sale of the right to use water for land in private ownership, to be limited, however, to the amount required for a tract not exceeding 160 acres."[12] (emphasis added).

The Warren Act, enacted in 1911 for the purpose of enabling the Secretary of the Interior to contract

[8]*Id.* at 4, 116, 132-33.

[9]43 Stat. 701, 43 U.S.C. §§371, 376, 412, 417, 433, 462, 466, 478, 493, 494, 500, 501, 526.

[10]See *Hearings Before House Committee on Irrigation and Reclamation on H.R. 8836 and H.R. 9611,* 68th Cong., 1st Sess. 40-41, 330, 331, 334 (1924).

[11]535 F.2d at 1132-33.

[12]*First Annual Report of the Reclamation Service,* H. Doc. No. 79, 57th Cong., 2d Sess. 70 (1902).

for the impounding, storage and delivery of irrigation water, provided in part:

> ". . . water so impounded, stored, or carried shall not be used otherwise than as prescribed by law as to lands held in *private ownership* within Government reclamation projects"[13] (emphasis added)

This Court, too, has observed that the requirements of federal reclamation law apply to lands in the Central Valley of California which "had been reclaimed and irrigated at the inception of the project" through private efforts. *Ivanhoe Irrig. Dist. v. McCracken, supra,* 357 U.S. at 283. The existence of irrigated, non-arid land is of no significance, for, as the Court noted, the object of reclamation is to arrest the irregular flow of water and regulate its seasonal and year to year variations. *Id.* at 281. The Court of Appeals' opinion made a similar determination. 535 F.2d at 1112-13, 1144.

SECTION 8 OF THE FLOOD CONTROL ACT AND RECLAMATION LAW

Petitioners have manifestly failed to demonstrate special and important reasons for a grant of the writ of certiorari under the standards of this Court's Rule 19. The Court of Appeals' careful, detailed and scholarly examination, analysis and conclusion that §8 of the Flood Control Act requires the application of federal reclamation law to the Pine Flat Dam is

[13]Act of Feb. 21, 1911, ch. 141, 36 Stat. 925, 43 U.S.C. §523.

completely consistent with every judicial, administrative and academic opinion on the subject. Its conclusion was mandated by the Ninth Circuit's earlier decision in *Turner v. Kings River Conservation District,* 360 F.2d 184, 192 (9th Cir. 1966). It is also completely in accord with *all* previous administrative determinations of two Solicitors of the Department of the Interior and two Attorneys General:

> Opinions of Solicitor Elmer F. Bennett, 64 I.D., 273 (1957); 65 I.D. 525 (1957).
>
> Opinion of Attorney General William P. Rogers, 41 Op. A. G. 377, 65 I.D. 549 (1958).
>
> Opinion of Solicitor Frank J. Barry, 68 I.D. 372 (1961), approved by Attorney General Robert F. Kennedy, 68 I.D. 370 (1961).

The Court of Appeals' opinion is in harmony with the views of the most eminent and respected commentators of the reclamation program. Sax, *Federal Reclamation Law,* II, Waters and Water Rights §120.5 (p. 217); Taylor, *The Excess Land Law: Execution of a Public Policy,* 64 Yale L.J. 477, 489-514 (1955). It is significant that this Court referred, with approval, to Professor Taylor's commentary in its landmark opinion on the Reclamation Act. *Ivanhoe Irrig. Dist. v. McCracken, supra,* 357 U.S. at 292. Other courts have afforded Professor Taylor's commentary similar respect. *State of Washington v. Udall,* 417 F.2d 1310, 1312, n. 1 (9th Cir. 1969); *Ivanhoe Irr. Dist. v. All Parties,* 53 Cal.3d 692, 707, n. 4, 3 Cal.Rptr. 317, 350 P.2d 69 (1960).

It is noteworthy that neither of the petitions before this Court have made reference to a single judicial or administrative precedent to support their argument that reclamation law does not apply to all or any part of the area served by the Pine Flat Dam. Even Associate Solicitor Cohen,[14] upon whom petitioners place such heavy reliance, was not called upon to question the applicability of reclamation law to this project.

Thus, instead of dealing with the precedent concerned specifically with the Pine Flat Dam, petitioners have chosen to challenge the legislative purpose behind both the Flood Control Act and the Reclamation Act. They prefer to rely on makeweight arguments of destroying "the settled economy of an important agricultural community",[15] destruction of "irrigation works and canals . . . privately paid for"[16] and a perfunctory, distorted representation of the legislative history.[17] Petitioners' *ipse dixit* argument asks this Court not only to overrule all previous judicial and administrative precedent, but also to question the wisdom of the legislation. Even if it wanted to do so, this Court may not inquire into the wisdom of legislation. *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146, 161 (1919). The Court has already rejected the well-worn argument that reclamation law is unconstitutional, unworkable, unreasonable and arbitrary when applied to an agricultural economy. *Ivanhoe Irrig. Dist. v. McCracken, supra,* 357 U.S. at 295-97.

[14]Memorandum M-35004, 68 I.D. 408 (1947).
[15]Tulare Pet. 34.
[16]*Ibid.*
[17]*Id.* at 34-39.

Finally, we call the Court's attention to the only two specific references by petitioners to the legislative history which they contend conflict with the Ninth Circuit's decision. Both references by petitioners are simply misleading.

First, reference has been made to an ambiguous comment by Congressman Whittington, Chairman of the House Flood Control Committee, during debate on the Flood Control Act of 1944, considered by petitioners to be "[I]llustrative of this history . . . which the Court of Appeals ignored or mischaracterized".[18] Petitioners have apparently overlooked the Court's examination of Congressman Whittington's participation in the debates.[19] We suggest it is petitioners, not the Court of Appeals, who have "ignored or mischaracterized" this history. No matter what label is placed upon petitioners' "illustrative" excerpt from the legislative history, they have conveniently omitted a most significant statement by Congressman Whittington, who was in charge of the bill on the floor of the House, concerning §6 of H.R. 4485, the forerunner of §8 of the 1944 Flood Control Act:

> "Mr. Whittington. Mr. Chairman, some of the friends and spokesmen for reclamation were critical of the language in the bill. It was asserted that where provision was made in a reservoir

[18]Tulare Pet. 35.
[19]535 F.2d at 1104-05.

where there was water for reclamation that the Commissioner of Reclamation should have the power to prescribe regulations ad libitum without regard to existing law. This is merely a perfecting amendment. *This amendment provides that these regulations shall be under existing reclamation law.* It is a perfecting amendment." (90 Cong. Rec. 4204 [1944]). (emphasis added).

The Court of Appeals properly interpreted the remarks of Congressman Whittington and others as acknowledgment and recognition that reclamation law would apply to the bill.

Further reliance has been placed upon a restrained and ambiguous statement of President Roosevelt.[20] The Court of Appeals properly considered this reference as "hardly a significant indication of the meaning of the statute".[21]

Assuming a presidential statement is to be considered as part of the legislative equation, we think it significant to observe the clear and unambiguous comment of President Truman on May 3, 1946, when he approved the appropriation measure for construction of the initial phase of the Pine Flat Dam:

> "The War Department Civil Functions Appropriation Bill, 1947 (H.R. 5400), which I approved on May 2, 1946, makes appropriations for a number of thoroughly worth-while projects that will further the development of the water resources of the Nation. I am also glad to note that the Congress, by the addition of certain provisos to

[20]Tulare Pet. 38.

[21]535 F.2d at 1117.

> the item for the Kings River Project, California, has afforded an opportunity for assuring that the Federal reclamation policy, including repayment and the wide distribution of benefits, will apply to that project. This is in accordance with the view that I have heretofore expressed and the position repeatedly taken by the late President Roosevelt. It is consistent with the policies laid down by the Congress in the Flood Control Act of 1944."[22]

As the foregoing discussion demonstrates, Congress evidenced no intention whatsoever to exempt the area served by Pine Flat Dam from the requirements of federal reclamation law. The efforts of petitioner Salyer Land Company to create an exemption for a smaller portion of that area, originally acquired under the Swamp Lands Act of 1850,[23] is similarly unavailing. Petitioner is unable to point to any provision of reclamation law exempting lands acquired as "swamp lands" and thus is met at the threshold with the *Ivanhoe* rule against exemptions by implication. (357 U.S. at 292).

The Ninth Circuit gave petitioner Salyer's argument the short shrift it deserved, correctly noting that the phrase "arid lands" in the title of the Reclamation Act of 1902 was a term of art used to refer to the lands of the sixteen Western states included within the Act's purview.[24] This point is amply dem-

[22]Reprinted in II Federal Reclamation and Related Laws Annotated 823 (1972 ed.).

[23]9 Stat. 519.

[24]535 F.2d at 1117.

onstrated by the very Congressional debates relied upon by petitioner, in which, for example, the "arid and semi-arid" lands of the West are compared with the "humid and sub-humid regions."[24a] At no point in the Reclamation Act itself, or the debates preceding it, is it even remotely suggested that Congress intended to limit reclamation jurisdiction in the West by use of the term "arid lands". Indeed, this purported jurisdictional test is nowhere even defined in federal reclamation law.

Salyer's overly ingenious argument that Congress secretly intended to create an exemption for swamp and overflow lands within the Kings River service area is erroneous for another simple reason. Without irrigation, swamp land is worthless.

> "More than 70,000,000 acres of the richest land in this country are now practically worthless or of slight value by reason of overflow and swamp conditions. 1 Kinney *On Irrigation and Water Rights* 23 (1912 ed.)
>
> ". . . holding back a considerable portion of the flood water of our great river systems in great reservoirs for the purpose of irrigation is already having the effect in aiding in the reclamation of swamp lands along their lower reaches. And, as greater storage works are constructed and utilized, this result will become greater and greater; and, at the same time, the water held up may be used for irrigation of arid lands, and for power purposes. It can be readily seen that, if the water of a river system is held up, and a considerable portion of the same is not permitted

[24a]Salyer Pet. 15.

> to flow down during the periods of high or flood water, the low lands adjacent to the lower portions of the river are not as liable to be newly flooded, and at the same time the main channel of the river will be kept open for the drainage of these low lands." *Id.* at 24.

Similar reasons for not implying the exemption sought by Salyer Land Company are found in the writings of historian Paul Wallace Gates. In the San Joaquin Valley of California, where the area served by Pine Flat Dam is located, Professor Gates described the concentration of ownership under the Swamp Lands Act of "great blocks of land that later, *when irrigated*, were to become very valuable."[25] Where such concentrated landholdings receive essential federal reclamation benefits, no policy justification is suggested by petitioner for creating an exemption from federal reclamation law—and none is apparent.

PREPAYMENT OF CONSTRUCTION COSTS

The total lack of merit to petitioners' argument on payout appears as much from obvious omissions in their petitions as from the superficial, unsubstantiated contentions actually advanced. Two crucial observations were made by the Court of Appeals in rejecting the payout argument. Neither has been challenged or explained away by petitioners.

[25]Gates, *History of Public Land Law Development*, *supra*, at 327. *See also id.* at 331, 334. (emphasis added). Further background on the Swamp Lands Act is found in *The Public Domain: Its History, With Statistics*, 219-221 (Public Land Law Commission 1880).

First, the Court of Appeals observed the "somewhat inconsistent" contentions of petitioners that Congress granted the Kings River Project a total exemption from reclamation law in the Flood Control Act and Congress in the same statute also authorized the landowners to escape the 160 acre limitation of reclamation law by payout. 535 F.2d at 1137. The Court was charitable with its euphemism. Incredibly, these inconsistent contentions are repeated in the Tulare petition, despite an effort to obscure the inconsistency by treating them in reverse order from the order of consideration by both the Court of Appeals and the District Court. No effort has been made to explain this readily apparent inconsistency.

Secondly, the Court of Appeals observed that bills were introduced in 1950 and 1951 to relieve Kings River landowners of acreage limitations in return for a lump sum payment of construction costs. Neither passed. *Id.* at 1139. It is perfectly apparent that such bills would have been completely unnecessary had the 1947 Cohen opinion and petitioners' theory of payout had any legal sufficiency or respectability whatever. In light of the total absence of a statutory exemption from reclamation law and the congressional rejection of bills specifically designed to accomplish that result by means of payout, the Court below was required to reject the payout argument. If any official of the Department of Interior had authorized such a device to escape reclamation law, he would have been simply thwarting the plain purpose of a valid law and acting beyond the scope of his authority. *United States v.*

City and County of San Francisco, 310 U.S. 16, 31-32 (1940).

Petitioners' silence about these matters in two, separate petitions is proof positive of the utter lack of merit in their requests for review.

As for the issues actually discussed by petitioners, several fundamental misconceptions regarding the ingenious payout issue of reclamation law permeate their arguments and require clarification. An assumption which underlies petitioners' argument is that the 160 acre limitation and recordable contract requirement of federal reclamation law are primarily security devices to ensure recoupment of the federal investment allocable to irrigation.[26] Applicable authorities, including the Court below, have uniformly rejected this "creditor-debtor" view and held, instead, that these provisions were the means adopted by Congress to ensure against monopolization and speculation with the federal subsidy. 535 F.2d at 1121. See also, *Taylor, supra,* 64 Yale L.J. at 489-514; Opinion of Solicitor Barry, 68 I.D. 372, 395 (1961).

Petitioners are simply incorrect when they assert that landowners of the King's River Service Area have forsaken the federal subsidy available by prepaying their allocable share of the construction costs.[27] As the Ninth Circuit correctly noted, repayment without interest charges over a forty-year period is only one aspect of the substantial federal subsidy conferred.

---

[26]See, *e.g.*, Tulare Pet. 8, 32-33.
[27]*Id.* 5, 8, 32.

535 F.2d at 1113, 1120-31, and n.'s 99 and 103.[28] In the statutory scheme, enactment of excess land limitations was in part motivated by the desire of Congress to eliminate a windfall enhancement in land values due to the irrigation benefits of the project. *Id.* at 1121. Many other benefits to landowners, such as flood control, are not reimbursable at all. *Id.* at 1120. Non-reimbursable benefits were recognized by this Court in *Ivanhoe Irrig. Dist. v. McCracken, supra,* 357 U.S. at 295-96.

Petitioners mount no challenge of substance to the Ninth Circuit's extensive analysis of the language[29] and legislative history[30] of the relevant provisions of reclamation law negating the payout theory. Since petitioners apparently concede that neither §46 nor any other provision of the reclamation law contains an express payout exemption, the rule of construction of reclamation law set out in *Ivanhoe Irrig. Dist. v. McCracken, supra,* 357 U.S. at 292, bars creation of a payout exemption by implication.

Nevertheless, petitioners suggest the Court of Appeals disregarded "the Cohen opinion and its prog-

[28]See also, §2 of the Warren Act of 1911, 36 Stat. 926, 43 U.S.C. §524. The Warren Act authorized the "impounding, storage and carriage" of water in excess of the requirements of lands within the project and provided that such surplus water could not be sold to any landowner in excess of an amount sufficient to irrigate 160 acres. The only benefit to these landowners outside the projects is regulation of the flow of water, yet Congress provided that acreage limitations would apply even to them. The regulated flow of the stored water of the Kings River is the major benefit of the Kings River project, making water available when it otherwise would not be. 535 F.2d at 1113.

[29]535 F.2d at 1118-19.

[30]*Id.* at 1122-35.

eny."[31] Under the circumstances presented in the case at bench, the Cohen opinion cannot be elevated to the status of a longstanding, consistent administrative practice. Indeed, petitioners have been unable to demonstrate that the Cohen opinion is entitled to the respect usually afforded the administrative practice of an agency.

The Ninth Circuit examined the practice of the Department of the Interior and did not find the "long-established administrative rulings and practices" claimed by petitioners.[32] After a detailed examination and analysis of the relevant statutes, regulations and administrative interpretations beginning with the 1902-12 period, the Court determined that, except for a brief period in the 1950's, the administrative practice was contrary to the payout theory. The Court determined that the 1947 Cohen opinion was "patently wrong", immediately challenged, always in dispute, and soon overruled. In short, as the Ninth Circuit's detailed discussion shows, there was never an administrative practice of payout sufficient to be of any legal significance. The Court's conclusion is corroborated by the consistent refusal of the Secretary of the Interior to execute a repayment contract providing for lump-sum payout. No such contract has ever been signed.[33]

[31]Tulare Pet. 15-20.

[32]535 F.2d at 1136-43.

[33]The complete answer to petitioners' argument that if payout is not an implied exemption, §46 constitutes an unconstitutional taking of property (Tulare Pet. 32-33) is found in the *Ivanhoe* opinion, *supra,* 357 U.S. at 296: "It is hardly lack of due process for the Government to regulate that which it subsidizes", citing

CONCLUSION

When petitioners' arguments were presented to Congress, they were rejected. Two Solicitors and Attorneys General followed suit. The Court of Appeals, guided by the statutory language, regulations and administrative practice, this Court's *Ivanhoe* opinion and its own earlier decision in *Turner v. Kings River Conservation District,* reached the same result. The Ninth Circuit's opinion has not been shown to be inconsistent in any way with long established legal principles.

A particular landowner may, if he wishes, forego the irrigation benefit resulting from the project. If he decides to do so, he may retain both his pre-existing water supply and his excess land.[34] If, on the other hand, he elects to participate in the project and receive its benefits, he must comply with reclamation law. If petitioners and the landowners of the King's River service area believe they are entitled to redress, we suggest they have chosen the wrong forum.

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Dated, San Francisco, California,
November 29, 1976.

Respectfully submitted,
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Wickard v. Filburn, 317 U.S. 111, 131 (1942). In addition, the Court in *Ivanhoe* noted that the courts are open for redress if the United States takes any compensable water or property right. *Id.* at 297.

[34] 535 F.2d at 1144.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-554

TULARE LAKE CANAL COMPANY, and
TULARE LAKE BASIN WATER STORAGE DISTRICT,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Brief on Behalf of North Kern Water Storage District, the City of Bakersfield, Buena Vista Water Storage District, Kern Delta Water District, Rosedale-Rio Bravo Water Storage District, Kaweah Delta Water Conservation District, Lower Tule River Irrigation District, Porterville Irrigation District, Vandalia Irrigation District, and Pioneer Water Company, Amici Curiae, in Support of the Petition for a Writ of Certiorari

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This brief is filed on behalf of the ten *amici curiae* named above with the written consents of all of the parties to the proceeding. The written consents are being filed with the Clerk concurrently with this brief.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 535 F.2d 1093, appears in a separate Appendix to the Petition for a Writ of Certiorari herein as Exhibit A. The opinion of the Court of

Appeals denying motions for rehearing and for rehearing *en banc*, reported at 535 F.2d 1143, appears in the Petitioners' Appendix as Exhibit B. The opinion of the United States District Court for the Eastern District of California, reported at 340 F.Supp. 1185 (1972), appears in the Petitioners' Appendix as Exhibit C.

The Findings of Fact, Conclusions of Law and Judgment of the District Court, which appear in the Record at C.T. 2588, *et seq.*, are attached to this Brief as an Appendix.

THE INTERESTS OF THE AMICI CURIAE

Each of the ten *amici curiae* has a substantial interest in storing its privately-owned irrigation water in a "dam-and-reservoir" flood control project constructed by the Corps of Engineers under Section 10 of the 1944 Flood Control Act. Each of these projects is similar, both in its physical characteristics and in its legal status, to the Kings River Project which is the subject of this litigation.

All but one of the *amici curiae* are public entities organized under the laws of California. Three of them are water storage districts, three are irrigation districts, one is a water district, one is a water conservation district, and one is a city. The tenth, Pioneer Water Company, is a mutual water company organized under the laws of California.

Each of these entities has certain rights to the diversion and distribution of waters of a natural stream across the channel of which the Corps of Engineers has constructed an upstream dam and reservoir, primarily for flood control purposes. Each entity distributes water to farmers within its service area for irrigation use. Some of the lands in each service area are held in ownerships exceeding 160 acres per owner. Each entity owns and operates its own system, built many years ago without governmental assistance, financial or otherwise, for diverting, transporting and distributing its water supply. Nine of the entities have rights, under contracts with the United States, to store their own irrigation water temporarily in the upstream reservoirs when space therein is not needed for flood protection. The other entity (Rosedale-Rio Bravo Water Storage District) may in the future acquire a right to do so.

The lands served with irrigation water by these ten entities include approximately 763,000 irrigable acres. These lands are all outside of and separate from the Kings River service area, which contains approximately 850,000 irrigated acres affected by the Kings River Project. The ten *amici curiae* do not include any of the 29 water distributing entities which distribute Kings River water (see page 21 of the Petition).

Each amicus curiae has an obvious and substantial interest in the outcome of this litigation. Each of them endorses and supports the Petition for a Writ of Certiorari herein.

Each of the projects in which the *amici curiae* are interested will now be briefly described.

Kern River Project

The "Isabella Project" on Kern River consists of a dam and reservoir completed in 1954 by the Corps of Engineers under the authority of Section 10 of the Flood Control Act of 1944 (58 Stat. 887 at 901). Section 10 is the same section that authorized the Kings River Project. The authorizing language for the Kern River Project is similar to but not identical with the language used in authorizing the Kings River Project.

The legislative history of the Kern River Project is similar to that of the Kings River Project, and the negotiations between the local interests and the United States for the purchase of the right to store privately-owned irrigation water in the two reservoirs proceeded along approximately parallel courses.

On October 23, 1964, North Kern Water Storage District and the Buena Vista Water Storage District, together with two other public districts,* entered into a contract with the United

*One of them being Tulare Lake Basin Water Storage District, one of the Petitioners herein.

States for the purchase of the permanent right to store privately-owned irrigation water in the Isabella Reservoir, whenever space in the reservoir might be available for that purpose, in return for the payment in cash of $4,573,000 to the United States. That sum of money represented the portion of the capital cost of the Kern River Project allocated by the United States to the value of the right to use the reservoir for the storage of privately-owned irrigation water. The entire sum of $4,573,000 was paid to the United States in cash on the date when the contract became effective, March 31, 1965. The contract contains provisions substantially identical to those contained in the contract between the United States and Tulare Lake Canal Company as described in the decision of the Court of Appeals herein (Petitioners' Appendix, Ex. A, pages 3-4; 535 F.2d 1095).

The decision of the Court of Appeals contains frequent references to the Kern River Project, and in Footnote 19 (Pet. App., Ex. A, p. 16; 535 F.2d 1102) states: "There is no basis for distinguishing the two projects." (This statement is not entirely correct, as there is a difference in the authorizing language used by the Congress in Section 10 with respect to the two projects, but the difference is not material for present purposes.) It is therefore obvious that the North Kern and Buena Vista districts have a very substantial interest in the outcome of this litigation.

The City of Bakersfield is now in the process of completing its purchase of substantial privately-owned water rights on Kern River, together with the right to the use of a portion of the storage space in Isabella Reservoir. The City's interest in this litigation therefore parallels that of the North Kern and Buena Vista Water Storage Districts.

Parenthetically it may be noted that the Kern River flows through the City of Bakersfield, a metropolitan area which has a population of almost 200,000 people. Prior to completion of the Isabella Flood Control Project on Kern River the City of Bakers-

field was subject to severe and not infrequent flood damage. The inhabitants of the City are major beneficiaries of the flood protection afforded by the Isabella Project; in fact, since it was completed in 1954, the Isabella Project has spared the inhabitants and property owners of the Bakersfield area untold millions of dollars in flood damage which would have occurred if the reservoir had not been in existence. The Project has paid for itself many times over in flood protection alone.

Kern Delta Water District is also in the process of acquiring substantial privately-owned water rights on the Kern River and the right to use a portion of the irrigation water storage space in Isabella Reservoir. Its interest in this litigation also parallels that of the North Kern and Buena Vista Districts.

Rosedale-Rio Bravo Water Storage District has a contractual right to certain of the waters of the Kern River and from time to time it may in the future make arrangements with one of the other parties for the use of storage space in Isabella Reservoir. Thus its interest in this litigation is similar to that of the other Kern River parties.

The area embraced within the boundaries of the four Districts having Kern River water rights is approximately 337,000 acres. Included within this area are approximately 323,000 acres of irrigable land, substantial parts of it in ownerships exceeding 160 acres per person.

Kaweah River Project

Section 10 of the 1944 Act also authorized construction by the War Department of the "Terminus Reservoir" Project on the Kaweah River, primarily for flood control purposes (58 Stat. 901). This project has been constructed and is operated by the Corps of Engineers. The Kaweah Delta Water Conservation District, one of the *amici curiae* herein, has entered into a contract with the United States for the use of storage space in Terminus

Reservoir for the storage of privately-owned irrigation water whenever space in the reservoir is available and is not needed for flood protection. That contract contains "standard" acreage limitation provisions, requiring "recordable contracts" whereby excess landowners agree to sell their excess lands as a condition to delivery of stored water to such lands. However, the contract also provides in Article 14 thereof that:

> "* * * in the event it ever shall be determined by the final judgment of a court of competent jurisdiction in an action to which the United States or any officer or representative thereof is a party that the laws of the United States do not at the date of this contract * * * * prohibit the delivery of stored water under this contract to the excess lands of a large landowner who has not executed a recordable contract * * *",

then the acreage limitation provisions of the contract will no longer be of any force or effect, and all "recordable contracts" shall be cancelled. Thus the District and its landowners have a direct and substantial interest in the final outcome of this litigation.

The gross area of Kaweah Delta Water Conservation District is approximately 337,000 acres including approximately 327,000 irrigable acres, substantial portions of which are held in ownerships exceeding 160 acres per person.

Tule River Project

In Section 10 of the 1944 Flood Control Act, Congress also authorized construction by the Department of War of the "Success Reservoir" on the Tule River for flood control and other purposes (58 Stat. 901). The reservoir has been completed, and some years ago Lower Tule River Irrigation District, Porterville Irrigation District, Vandalia Irrigation District, and Pioneer Water Company, each of which is one of the *amici curiae* herein, entered into a contract with the United States for the permanent right to use

storage space in Success Reservoir, when not needed for flood protection, for the storage of privately-owned irrigation water. The contract contains standard acreage limitation provisions. It also contains a clause, like that in the Kaweah contract described above, cancelling such provisions in event of a favorable court decision.

These four entities on Tule River contain in the aggregate approximately 124,000 acres of land of which approximately 113,000 acres are irrigable. Substantial portions of this land are owned in areas of more than 160 acres per person. The interest of these entities and their constituent landowners in the final outcome of this litigation is obvious and substantial.

SUMMARY OF ARGUMENT

The Court of Appeals has decided two extremely important questions of Federal Reclamation Law which have not been, but should be, settled by the Supreme Court. They are questions affecting a great many agricultural areas in the United States, in addition to the very large Kings River area which is the subject-matter of the decision. The presence and interest of these ten *amici curiae* illustrate the importance of the decision in areas outside the Kings River area. The agricultural areas served with irrigation water by these ten *amici curiae* include approximately 763,000 irrigable acres, equal to about 1,200 square miles.

The Court of Appeals decided that the general provisions of Section 8 of the 1944 Flood Control Act, which the Court held to be applicable to all dam-and-reservoir flood control projects generally, prevail over the specific provisions of Section 10 of the same statute which relate to the Kings River Project only. This decision of the Court of Appeals is directly contrary to a long line of Supreme Court decisions establishing the rule that specific provisions of a statute prevail over general provisions of the same statute which might be applicable in the absence of the specific provisions. Thus the decision is in conflict with Supreme Court decisions.

In three respects the decision of the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings" as to call for this Court's exercise of its power of supervision:

> (1) In exercising its appellate jurisdiction, the Court of Appeals swept aside many of the Findings of Fact of the District Court without ever mentioning them or considering whether they were supported by the evidence in the Record. In its 52 printed pages and 201 footnotes, the decision of the Court of Appeals contains not a single reference to the Findings of Fact, not a single reference to the Record, not a single citation of the over 700 documentary exhibits introduced in evidence, and not a single citation to the testimony of a single witness.
>
> (2) In deciding that the so-called "pay-out" principle is invalid, the Court ignored—did not even mention, let alone consider or discuss—extensive and uncontradicted evidence, as well as Findings of Fact of the District Court, establishing that the Congress approved the "pay-out" principle and its application to this very project—the Kings River Project.
>
> (3) In its decision the Court of Appeals completely ignored—did not even mention, let alone discuss or consider —the Findings of Fact of the District Court establishing that the Defendant had, over a long period of years, expended large sums of money in reliance upon repeated assurances by officials of the Department of the Interior to the effect that the "pay-out" principle would be included in the contract for the use of space in the Kings River Reservoir for the conservation storage of privately-owned irrigation water, and that such assurances could not lawfully be repudiated because to do so would cause very substantial damage to the Defendant which had relied upon them. The Findings of Fact establishing this defense remain unchallenged. They are

> still in full force and effect, and they entitle Defendant to an affirmance of the District Court's judgment as a matter of law; yet the Court of Appeals totally ignored this alternative defense.

In each of these three respects the Court of Appeals failed to carry out the "accepted and usual" duties and functions of an appellate court.

The foregoing reasons for granting a writ of certiorari meet three of the criteria for granting a writ as delineated in paragraph 1(b) of Supreme Court Rule 19.

ARGUMENT

REASONS FOR GRANTING A WRIT OF CERTIORARI

Rule 19.1 of the Supreme Court Rules, indicating "the character of reasons which will be considered" in acting upon a petition for a writ of certiorari, includes the following:

> "(b) Where a court of appeals * * * has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, * * * as to call for an exercise of this court's power of supervision."

Each of these reasons is applicable here.

1. The Court of Appeals "Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court"

In reversing the judgment of the District Court herein, the Court of Appeals for the Ninth Circuit decided two extremely important and far-reaching questions of Federal Law, not yet ruled upon by any other court:

First, the Court of Appeals held that dam-and-reservoir projects built by the Corps of Engineers primarily for flood control purposes under the 1944 Flood Control Act (58 Stat. 887) are subject to the Reclamation Laws of the United States (Act of June 17, 1902, 32 Stat. 388, as amended), including particularly the 160-acre limitation upon land ownerships contained in Section 46 of the Act of May 25, 1926, 44 Stat. 636 at 649.

Second, the Court of Appeals held invalid the so-called "pay-out" principle under which the acreage limitation provisions of Reclamation Law do not apply to land ownerships within the boundaries of an irrigation district or other entity in a reclamation project if, instead of taking advantage of the very substantial financial subsidy represented by the 40-year interest-free instalment payment plan available under Reclamation Law, the district or other entity pays in a lump sum to the United States the full amount which the United States determines to be that district's or entity's allocated share of the entire cost of the construction of the reclamation project.

The first of these questions affects all dam-and-reservoir flood control projects constructed by the Corps of Engineers under the 1944 Flood Control Act or under other prior or subsequent Congressional authorizations, except those constructed in whole or in part prior to the enactment of the 1944 Act. Furthermore, it affects all such projects located anywhere in the United States, not just those in the Western States where Reclamation Law applies. The second of the questions affects all Reclamation Projects, wherever located.

The importance of these questions to the agricultural economy of the country is stressed in the Petition, and need not be reemphasized here.

However, the presence of these ten *amici curiae* supporting the Petition illustrates in very specific manner the great importance outside of the Kings River area of the questions of Federal law

which are here involved. The lands served by these ten entities contain over 763,000 irrigable acres—approximately 1,200 square miles,—extending from the southern boundary of the Kings River Delta on the north to the foothills of the Tehachapi mountains on the south. These lands include practically all of the eastern side of the southerly portion of the Central Valley of California, and they constitute one of the largest and most productive areas of irrigated agricultural land in the United States.

The land ownership pattern of these lands has evolved under the normal influences of a free economy over a period of more than a century. The ultimate decision of this litigation will determine whether these lands will be allowed to continue to produce food and fiber with maximum efficiency and minimum cost, or whether, to the contrary, they will be subjected to artificial, non-economic forces tending to fracture large and efficient producing ownerships into small, inefficient and, in many cases, altogether impractical operating units, with inevitable increases in costs of production and consequent increases in prices to be paid by consumers.

2. The Court of Appeals "Has Decided a Federal Question In a Way In Conflict With Applicable Decisions of This Court"

The Court of Appeals decided that the general provisions of Section 8 of the Flood Control Act of 1944 prevail over the specific provisions of Section 10 which are applicable to the Kings River Project only. This decision is of direct interest to these *amici curiae* because the flood control projects which affect them were also authorized by specific, separate provisions of Section 10.

This decision of the Court of Appeals is in direct conflict with a long line of decisions of the Supreme Court holding that specific provisions of a statute prevail over general provisions in the same or another statute.

Almost a century ago, in the case of *Townsend v. Little* (1883), 109 U.S. 504, the Supreme Court stated what it called "the well-settled rule" as follows:

> "* * * * general and specific provisions, in apparent contradiction, whether in the same or different statutes, and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general * * * *" (p. 512).

Later decisions of the Supreme Court applying the same rule include:

Rodgers v. United States (1902), 185 U.S. 83 at 92.

Kepner v. United States (1904), 195 U.S. 100 at 125:

"It is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling."

Ginsberg & Sons, Inc. v. Popkin (1932), 285 U.S. 204 at 208:

"General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. * * * Specific terms prevail over the general in the same or another statute which otherwise might be controlling."

MacEvoy Co. v. United States (1944), 322 U.S. 102 at 107:

"However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. * * *' "

Fourco Glass Co. v. Transmirra Products Corporation (1957), 353 U.S. 222 at 228-229.

Bulova Watch Co. v. United States (1961), 365 U.S. 753 at 758.

Morton v. Mancari (1974), 417 U.S. 535 at 550-551.

In holding that the use of the Kings River Project for the storage of privately-owned irrigation water is to be administered by the Secretary of the Interior under the Reclamation Laws, the Court of Appeals relied solely upon the general provisions of Section 8 of the 1944 Flood Control Act (58 Stat. 887), and particularly upon the third sentence of Section 8 which the Court itself described as "general in coverage" (Pet. App., Ex. A, page 39; 535 F.2d 1116). The Court paid scant attention to the specific provision of Section 10 of the Act, which relates exclusively to the Kings River Project, and which specifically directs the Secretary of War (*not* the Secretary of the Interior) to make arrangements for payments to the United States for use of the Kings River project for the storage of privately-owned irrigation water.

The Court of Appeals devoted nearly one-half of its lengthy decision to a discussion of Section 8 and its legislative history (Pet. App., Ex. A, pages 9-43; 535 F.2d 1099-1118), quoting and relying upon communications to Congressional Committees from many sources, including President Roosevelt (e.g., Footnotes Nos. 13, 16 and 52) and Secretary Ickes (e.g., Footnotes Nos. 33, 46, 52 and 57), and upon testimony in Committee hearings by Secretary Ickes (e.g., Footnote No. 44) and by Reclamation Commissioner Bashore (e.g., Footnotes Nos. 18, 19, 20, 21, 22, 23 and 44). There are also some thirty citations to the *Congressional Record* in this portion of the opinion.

In contrast, the Court of Appeals relegated Section 10 to one short paragraph of text (Pet. App., Ex. A, page 38; 535 F.2d 1115) and three footnotes (Nos. 27, 83 and 177). It appears that the Court of Appeals was so fascinated with studying what various people *wanted* Congress to do, that it failed adequately to study what Congress actually *did* do in specifically authorizing the Kings River Project.

It is most appropriate, therefore, to examine the statute itself to see exactly what the Congress did.

Section 8 of the 1944 Flood Control Act reads in full as follows:

"SEC. 8. Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the cost of structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirement shall not prejudice lawful uses now exisiting [sic]: *Provided,* That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the Army engineers, which provides conservation storage of water for irrigation purposes." (58 Stat. 891)

For ready reference, the pertinent portion of the third sentence is underscored.

It is obvious beyond question that all parts of Section 8 constitute general provisions. The Court of Appeals has decided, on the basis of what it called the "general" provisions of the third sentence, that Section 8 applies to *all* dam-and-reservoir flood control projects including those "for which no additional irrigation facilities are required" (Pet. App., Ex. A, page 39; 535 F.2d 1116). As so construed, Section 8 applies equally to all "dam-and-reservoir" flood control projects operated by the Secretary of War except those already constructed in whole or in part. Thus Section 8 applies to projects authorized before 1944 but not yet constructed, to those authorized by the 1944 Act, and to those authorized in subsequent statutes. Furthermore, as noted above, Section 8 applies to projects in all parts of the United States, not just those in the Western or "Reclamation" States.

Section 8 is indeed about as "general" a provision as one could imagine.

Despite the generality of the first two sentences of Section 8, which refer to "any dam and reservoir project," those sentences are plainly limited to the situations as therein stated in which the Secretary of War, upon recommendation of the Secretary of the Interior, has made the determination referred to, a report and findings thereon have been made by the Secretary of the Interior, and specific authorization has thereafter been given by the Congress for the construction of "additional works." None of the conditions set forth in these two sentences, which would bring the Federal Reclamation Laws into play, has occurred in this case (Finding No. 12; App. pp. 7-8). The Court of Appeals was therefore induced to rely on the even more general language, underscored above, of the third sentence, and to maintain that the wording there used made the Federal Reclamation Laws applicable even in the absence of the determination, additional works, etc. referred to in the first two sentences. (Pet. App., Ex. A, pages 32, 38-39; 535 F.2d 1111-1112, 1115-1116.)* But on the Court's own interpretation of the third sentence of Section 8, this immediately required comparison of the exceedingly general language of Section 8, and particularly its third sentence, with the very specific language of Section 10, which dealt expressly and exclusively with the Kings River Project.

We now turn to Section 10.

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*We fully agree with the position of the Petition for a Writ of Certiorari, pp. 5-6, 34-37, that the third sentence of Section 8 simply does not permit the interpretation given it by the court below. Our present point, however, involves the well-established proposition that, in any event, as applied to the Kings River Project the general language of Section 8 must be matched against, and yield to, the specific provisions of Section 10.

The preamble of Section 10 and the paragraph of that section applying specifically to the Kings River Project read in full as follows:

> "SEC. 10. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein: *Provided,* That the necessary plans, specifications, and preliminary work may be prosecuted on any project authorized in this Act to be constructed by the War Department during the war, with funds from appropriations heretofore or hereafter made for flood control, so as to be ready for rapid inauguration of a post-war program of construction: *Provided further,* That when the existing critical situation with respect to materials, equipment, and manpower no longer exists, and in any event not later than immediately following the cessation of hostilities in the present war, the projects herein shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements: *And provided further,* That penstocks and other similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam authorized in this Act for construction by the War Department when approved by the Secretary of War on the recommendation of the Chief of Engineers and the Federal Power Commission." (58 Stat. 891-2)

* * *

> "The project for flood control and other purposes for the Kings River and Tulare Lake Basin, California, is hereby authorized substantially in accordance with the plans contained in House Document Numbered 630, Seventy-Sixth Congress, third session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable at an estimated cost of $19,700,000: *Provided,* That the conditions of local cooperation specified in said document shall not apply: *Provided further,* That the Secretary of War shall make arrangements for payment to the United States by the State or other responsible agency, either in lump sum or annual installments, for conservation storage when used: *Provided further,* That the division of costs between flood control, and irrigation and other water uses shall be determined by the Secretary of War on the basis of continuing studies by the Bureau of Reclamation, the War Department, and the local organizations." (58 Stat. 901)

For ready reference, the specific direction to the Secretary of War regarding arrangements for use of the reservoir for conservation storage is underscored. Other paragraphs of Section 10 authorized some 90 additional flood control projects throughout the country, including those on the Kern, Kaweah and Tule rivers described above (58 Stat. 892-903).

This paragraph of Section 10 relates to one dam-and-reservoir project only—the Kings River Project. It contains very precise and specific provisions applying to that project and none other. It is about as "specific" a provision as one could imagine.

The contrast between the general provisions of Section 8 and the specific provisions of Section 10 is readily apparent. It is reflected most obviously in the scope of application of the two sections—Section 8 as construed by the Court of Appeals is a general provision which applies to all dam-and-reservoir projects across the country operated by the Secretary of War; Section 10, on the other hand, relates to the Kings River Project only. The contrast is reflected in the terminology used—Section 8 speaks of utilization of projects "for irrigation purposes" generally, while Section 10 specifically singles out "conservation storage" uses to be made of the Kings River Project. And it is reflected in the conflicting mandates given to two different government agencies.

The Court of Appeals has specifically held (Pet. App., Ex. A, page 43; 535 F.2d 1118) that Section 8 makes all of the provisions of Reclamation Law, administered exclusively by the Secretary of the Interior, applicable to the Kings River Project, including the 160-acre ownership limitation provisions of Section 46 of the 1926 Act (44 Stat. 636 at 649). The provisions of Reclamation Law are all *general* provisions, applying to all reclamation projects throughout the Western States. Under those laws the Secretary of the Interior does everything, including the allocation of construction costs among the irrigation and other benefits, the negotiation of repayment contracts, and the administration of the acreage limitation provisions.

Section 10, on the other hand, specifically provides that the allocation of costs as between flood control, irrigation and other uses of the Kings River Project shall be determined by the Secretary of War "on the basis of continuing studies by the Bureau of Reclamation, the War Department and the local organizations". Thus the Secretary of the Interior, through the Bureau of Reclamation, has a function to perform under the specific Kings River Project provisions of Section 10, but that function is limited to participating in, but not determining, the cost allocation process. Section 10 goes on to provide that when the portion of the cost to be allocated to use of the Kings River Project reservoir for conservation storage of privately-owned irrigation water is determined, the Secretary of *War* shall make arrangements for obtaining payment for such use of the reservoir "either in lump sum or in annual instalments". Needless to say, the Secretary of War has no authority to impose or enforce acreage limitations.

Obviously, these two sections of the statute present a square conflict as to who shall do what. Under the general provisions of Section 8 the only function given to the Secretary of War is to make a finding of feasibility. The Secretary of the Interior (with Congressional approval) does everything else. Under the

specific provisions of Section 10 the only function given to the Department of the Interior with respect to the Kings River Project, is to participate in the cost allocation process, and the Secretary of War actually determines the cost allocation and does everything else.

Both provisions cannot possibly apply. They are in direct conflict with each other. But the general provisions of Section 8 and the specific provision of Section 10 "may subsist together", as the Supreme Court said in *Townsend v. Little, supra,* "the specific [Section 10] qualifying and supplying exceptions to the general [Section 8]."

The rule established by the long line of Supreme Court decisions cited above, is that when general and specific provisions of a statute conflict, the specific provision prevails. Under that rule, the provisions of Section 10 relating specifically and solely to the Kings River Project necessarily prevail over the provisions of Section 8 relating to flood control projects generally.*

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*There was a clear and sound reason for treating the Kings River Project specially and excepting it from the general provisions of Section 8. That section provides for the construction of "additional works" (e.g., transportation canals and distribution ditches) in order to make dam-and-reservoir flood control projects useful for irrigation purposes. As stated in the Findings of Fact of the District Court a complete system of canals and ditches was already in existence and owned and operated by the water users in the Kings River service area, and "no canals, ditches or other distribution works have ever been built [in the area] by the United States or with any federal assistance" (Finding No. 10; App. page 6). All waters of the Kings River available for irrigation use were already "fully appropriated" (i.e., owned) by the water users (Finding No. 8; App. page 4), and "no new or supplemental water supply has been or is to be developed by Pine Flat Dam [i.e., the Kings River Project] which can be sold by the United States" (Finding No. 12; App. pp. 7-8). The Congress was fully informed of these facts, as well as the fact that a substantial part of the Kings River service area was physically unsuited to small-scale farming, and Congress knew that no "additional works" would be needed to make the Kings River Project useful for the storage and distribution of the privately-owned irrigation water (Findings Nos. 7-10; App. pp. 4-6). It was appropriate, therefore, for the Congress to except the Project from the general provisions of Section 8. This was done in Section 10. The same physical conditions and circumstances existed in 1944 with respect to the Kern, Kaweah and Tule Projects.

When the Court of Appeals held that the general provisions of Section 8 override the specific provision of Section 10 relating to the Kings River Project, the Court "decided a Federal question in a way in conflict with" the above-cited decisions of the United States Supreme Court which established the "well-settled rule" that "specific terms prevail over the general".

It is respectfully submitted that a Writ of Certiorari should be issued so as to enable this Court to correct this error of the Court of Appeals.

3. The Court of Appeals "Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings * * * * As to Call for an Exercise of This Court's Power of Supervision."

A. THE COURT HAS IGNORED THE FINDINGS OF FACT OF THE DISTRICT COURT

The Findings of Fact of the District Court, copied in the attached Appendix, were made after a lengthy trial, during which over 700 documentary exhibits were introduced in evidence and 918 pages of Reporter's Transcript were produced including the testimony of 12 witnesses.

In the entire 52 pages of the reported decision of the Court of Appeals (535 F.2d 1093-1144), including its 201 footnotes, there is not a single reference to the Findings of Fact! Even more remarkable, there is not a single citation to the record in the District Court—not a single citation to even one of the over 700 exhibits—not a single citation to a page of testimony of any witness.* In numerous instances the Court of Appeals has overridden the Findings of the District Court without mentioning the Findings and without considering the evidence on which the Findings were based.

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*Some of the documents referred to in the opinion were introduced in evidence (e.g., the "1956 Study" hereinafter mentioned), but the opinion does not cite them as exhibits in the Record nor give their exhibit numbers. There is one reference in the opinion to testimony at the trial (Footnote No. 80), but the witness is not identified and the transcript references are not given.

The decision was rendered some two and one-half years after the submission of the case following oral argument in the Court of Appeals. The length of the decision, its scholarly style, and its 201 footnotes, give evidence of an enormous amount of independent research extending far beyond the record and briefs of the parties. The decision rests in large part upon evidence not in the record and never subjected to analysis or debate by counsel for the respective parties. In short, the decision is an elaborate, argumentative dissertation, based largely upon original research, without reference to the record in the case before it. This is not the "accepted and usual" function of an appellate court.

One cannot help noticing that, whereas the Court of Appeals paid no attention whatever to the Findings of Fact of the District Court, the Court referred more than a dozen times to the voluminous writings of Professor Paul S. Taylor (Footnotes 5, 99, 103, 106, 109, 139, 185, 193, 198 and 201). Professor Taylor is not a lawyer nor a law teacher; he is an economist (1976-7 *Who's Who in America,* page 3104). For several decades, however, Professor Taylor has been an ardent and articulate crusader for *extending* the acreage limitation provisions of Reclamation Law (See for example, the references in Footnotes 106 and 109 to Professor Taylor's contention that the 160-acre limitation should be perpetual). The opinion of the Court of Appeals is a tribute to Professor Taylor's advocacy.

B. THE COURT OF APPEALS COMPLETELY IGNORED THE EXTENSIVE EVIDENCE IN THE RECORD OF CONGRESSIONAL APPROVAL OF THE "PAY-OUT" PRINCIPLE

On November 9, 1953, the Secretary of the Interior confirmed the authority of the Bureau of Reclamation to negotiate with the Kings River water interests on the basis that:

> "* * * the repayment contract will provide for repayment of the irrigation allocation in 40 years without interest, with the option on the part of the water users organizations to make a lump sum payment in advance and that the excess land laws become inoperative upon payment in full * * *."

(See the letter from the Secretary of the Interior dated March 2, 1954, to Mr. C. J. Haggerty, Secretary-Treasurer of the California State Federation of Labor, a copy of which appears as Exhibit 62 in PART ONE of what the Court of Appeals calls the "1956 Study", hereinafter described).*

The announcement by the Department of the Interior that the Kings River contract would embody the "pay-out" principle stirred up a veritable hornets' nest of public controversy. For example, Professor Paul S. Taylor published a long article in the February, 1955 issue of the *Yale Law Journal* bitterly criticizing the Secretary of the Interior for this action (64 *Yale L.J.*, pages 477-514, cited in Footnotes 106, 109, 139 and 185 of the decision of the Court of Appeals). This controversy regarding the "pay-out" principle came to the attention of several Senators and members of Congress as shown by copies of correspondence which are exhibits to PART ONE of the "1956 Study": Senator Paul H. Douglas (Exhibit 49), Senator James E. Murray (Exhibit 80), Senator Wayne Morse (Exhibit 92), and Congressman John F. Baldwin of California (Exhibit 98).

As a result of this public controversy, Congressman William L. Dawson, Chairman of the Committee on Government Operations of the House of Representatives, on December 7, 1955, addressed a letter to Secretary McKay requesting an explanation of the Secretary's decision and suggesting that further action on the Kings River negotiations be held in abeyance pending study of the matter by the Government Operations Committee. A copy of Congressman Dawson's letter appears on the sixth fly-leaf of PART ONE of the "1956 Study". The letter reads in full as follows:

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*The "1956 Study" was introduced in evidence herein, by the United States, as Exhibits 84 and 85 (R.T. 772 and 776), but the Court of Appeals never mentions that fact.

> "It has been brought to the attention of the Committee on Government Operations that the Department of the Interior is now engaged in negotiating or concluding a contract arrangement in relation to the project variously referred to as 'Pine Flat Dam', 'Kings River and Tulare Lake Project'.
>
> The desirability and propriety of this contract, from the standpoint of efficiency and economy, obviously fall within the jurisdiction of the Committee on Government Operations. I, therefore, request that you furnish me, for the use of the Committee, a comprehensive statement of the history and status of this project, and of any pending agreements relating thereto. Moreover, I suggest that in view of the interest of this Committee, further action in the matter be held in abeyance until such time as the Committee has had a chance further to inform itself in the premises."

On December 22, 1955, the Acting Secretary of the Interior, Clarence A. Davis, responded to Congressman Dawson's letter, stating that the Department was reviewing the laws and departmental precedents involved in this matter, promising to supply copies of the review to Congressman Dawson, and stating that action on the negotiated contract would be deferred until completion of the analysis. (A copy of this letter appears on the fifth fly-leaf of PART ONE of the "1956 Study".)

On January 5, 1956, Congressman Earl Chudoff, Chairman of the Public Works and Resources Sub-Committee of the Committee of Government Operations of the House of Representatives, wrote to Secretary McKay specifically requesting that the Department's analysis include the terms and conditions of the proposed contract with the Kings River interests. Congressman Chudoff's letter included the following:

> "I also wish to renew Chairman Dawson's suggestion that in view of the interest of this committee, further action on any proposed arrangement or contract be held in abeyance until the committee has had a chance to study the matter and the terms and conditions of the proposed contract."

(A copy of this letter appears as the fourth fly-leaf of the "1956 Study".)

This letter was answered by Mr. Davis on January 16, 1956, in a letter which concluded with the following paragraph:

> "Action on the negotiated contract that will be submitted to the Department for approval will be deferred until this analysis is finished and until there has been reasonable time to give it necessary study."

(The third fly-leaf of the "1956 Study".)

On May 25, 1956, Under-Secretary Davis wrote to Congressman Chudoff (see the second fly-leaf) transmitting 30 copies of a two-volume report entitled "Excess Land Provisions of the Federal Reclamation Laws and the Payment of Charges". These are the volumes the Court of Appeals calls the "1956 Study" (Footnotes 142 and 173). Each volume is over an inch thick.

The first volume (PART ONE) contains a 56-page Summary of the Acts of Congress and actions of the Department of the Interior followed by a chronologically-arranged collection of copies of Department rulings, correspondence, memoranda, etc. The entire volume relates exclusively to the "pay-out" principle.

The first paragraph of the Summary reads as follows:

> "This summary is designed to present the principal provisions of the acts of Congress referred to as the 'Reclamation Laws' in so far as they deal with or bear upon the effect which final payment of capital charges has upon the excess land limitations of those laws with respect to the lands as to which such charges are paid, and to outline the decisions, actions, and statements coming officially from the Department of the Interior relating thereto. The summary is limited to this phase of the excess land provisions, and does not attempt to cover the application of such provisions in any manner not directly related to the question under inquiry. Some of the general legislation and some special enactments dealing otherwise with the general subject matter are therefore not cited."

The concluding paragraph of the Summary appearing on page 56, reads as follows:

> "The proposal contained in the repayment contract arrangements negotiated with the Kings River Conservation District is simply that *when and to the extent construction charges repayable under that contract are paid to the United States, the lands with respect to which full payment is made will no longer be subject to the excess-land limitations of the Federal reclamation laws*. Development of this phase of the proposed contract constitutes the application of a principle which is consistent with a policy of long standing and which is compatible with the construction of Acts of Congress as they have been interpreted by administrative officials and legal staffs of the Department over a long period of years." (Emphasis supplied)

This paragraph clearly and explicitly states to the Congress that the "pay-out" principle will be included in the Kings River contract, applying a policy of long standing.

The second volume (PART TWO) constitutes a record of the negotiations, up to the date of the "1956 Study", between the United States and the Kings River water users with respect to a contract for the use of storage space in the Kings River Flood Control Reservoir (the Pine Flat Dam and Reservoir) for the storage of privately-owned irrigation water. The volume consists of a 17-page summary of the negotiations, followed by 55 exhibits which are copies of correspondence, memoranda, and other documents relating to the negotiations. Throughout this record, there are many assurances by officials of the Department of the Interior to the effect that "pay-out" (i.e., payment in full of the allocated share of the construction costs) would eliminate application of the acreage limitation provisions of Reclamation Law.

A copy of the then pending draft (dated October 27, 1955) of the proposed contract between the United States and the Kings River interests appears as Exhibit 52 in this volume. It includes

the "pay-out" principle. The draft contains provisions specifically permitting prepayment in full "by any member unit, landowner, or stockholder" (pages 7 and 8), a provision on page 15 that the acreage limitations "shall not apply" to lands for which payment in full has been made, and an express statement on page 17 that such payment terminates the applicable "recordable contract" under which the landowner had agreed to dispose of his excess lands.

With respect to the reaction of Congress to the Interior Department's report that the "pay-out" principle would be included in the Kings River contract, the District Court made the following Finding of Fact (App. page 13):

> "20. This study and the views expressed therein endorsing the pay-out principle were widely disseminated by the Department of the Interior when presented to Congress in 1956. Congress did not reject this interpretation of reclamation law, but, to the contrary, it enacted general reclamation legislation, the Small Reclamation Projects Act of 1956 (70 Stat. 1044, 43 U.S.C. § 4223), based upon and expanding the principle by providing that payment of the capital component, or of interest thereon, attributable to excess lands on a project completely displaces the application of acreage limitation to such lands. Congress had also recognized in the Russian River project authorization of the Flood Control Act of 1950 (64 Stat. 170) that lump sum payment for irrigation benefits obviated the application of acreage limitation to excess lands in a project coming within the provisions of Section 8 of the Flood Control Act of 1944."

The significance of this proof of Congressional approval of the "pay-out" principle cannot possibly be overstated, yet the Court of Appeals ignored it. The Congressional Committees had become disturbed by the public outcry over the Department of the Interior's announced intention to enter into a contract with the Kings River water users which would embody the "pay-out" principle. The Congressional Committees demanded an explanation

from the Department of the Interior. The Department supplied a report confirming the fact that the "pay-out" principle would indeed be included in the proposed contract, and furnished a copy of the then pending draft of the agreement embodying the "pay-out" principle. The Department also supplied a vast amount of material showing that this "pay-out" principle was consistent with Reclamation Law, and that it had been consistently applied by the Department over a period of many years.

As promised in the Department's letter of January 16, 1956, action on the proposed contract was deferred, following submission of the report to the Congressional Committee, for a "reasonable time" so that the Committee could give it the "necessary study". But, as the District Court stated in Finding 20, Congress did not reject the Department's interpretation of Reclamation Law. Having questioned the Department's policy and received the Department's explanation and justification of it, the Congressional Committee allowed the policy to stand. In other words, the Committee accepted it.

Negotiations with the Kings River interests were later resumed on the announced basis, i.e., including the "pay-out" principle. They continued on that basis until "pay-out" was disapproved by the new Solicitor of the Department of the Interior on December 26, 1961 (Finding 16; App. pages 10-11).

Congress not only accepted the explanation and justification of the "pay-out" principle, but, as the District Court found, Congress went on to apply the "pay-out" principle and even expand upon it in subsequent legislation. (Finding 20; App. page 13).

As noted above, the Department's report to Congress (the "1956 Study") was introduced by the United States in evidence at the trial of this action as Exhibits 84 and 85. The significance of this evidence was confirmed by the Findings of Fact of the District Court (Findings 18, 19 and 20; App. pages 11-13) and it was fully presented to the Court of Appeals in the brief of Tulare Lake Canal Company, the Defendant-Appellee (see pages

36, *et seq.*). The brief also called attention emphatically to the Congressional actions applying and implementing the "pay-out" principle. (Brief pages 46, *et seq.*)

Despite the obvious significance of this evidence of Congressional approval of the "pay-out" principle, the decision of the Court of Appeals does not even mention it, let alone discuss it. Nor does the Court mention the Findings of Fact as to this evidence (Nos. 18, 19 and 20; App. pages 11-13). The Court's decision contains a number of references to certain of the exhibits in the "1956 Study" (see, for example, Footnotes 173, 181, 188-193). However, the Court never mentions the fact that the two-volume document was the answer by the Interior Department to a Congressional demand for an explanation of its decision to apply the "pay-out" principle in the Kings River contract. Nor does the Court take notice of the final paragraph of the Department's Summary (quoted above at page 28), concluding that the "pay-out" principle is valid. The Court's failure to take notice of this statement of the Department's approval of the "pay-out" principle is all the more remarkable in view of the fact that the paragraph was quoted in full in Finding 18 (App. pages 11-12) and in Defendant-Appellee's Brief in the Court of Appeals (page 36).

Most remarkable of all, however, is the circumstance that the Court of Appeals apparently did not perceive the significance of the facts that (1) Congressional Committees had questioned the Department of the Interior about the application of the "pay-out" principle to the Kings River contract; (2) the Department had replied that the "pay-out" provisions would be included in the proposed contract, and demonstrated that such a provision was lawful and proper under existing law; and (3) the Congress not only accepted the Department's conclusion and explanation, but actually applied and expanded the "pay-out" principle in subsequent legislation. (Finding 20; App. page 13).

It is respectfully submitted that in ignoring this evidence and

the Findings of the District Court based thereon, the Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings" as to call for a review by the Supreme Court.

C. THE COURT OF APPEALS IGNORED AND LEFT UNDISTURBED FINDINGS OF FACT WHICH ENTITLED THE DEFENDANT TO AN AFFIRMANCE OF THE JUDGMENT AS A MATTER OF LAW

The District Court found as a fact that the Defendant was entitled to judgment because it had relied to its detriment upon repeated Government assurances that the "pay-out" principle would be available as a method of avoiding application of the Acreage Limitation Provisions.

Findings of Fact Nos. 24, 25 and 26 (App. pages 16-17) establish that:

> "* * * * the Kings River water users relied upon numerous and repeated assurances made to them by the Bureau of Reclamation and the Department of the Interior that * * * * acreage limitation would no longer apply to any Kings River contracting entity after it made final payment of capital charges, such as was done by the defendant in this case. * * * * The Kings River water users, including the defendant herein, have expended millions of dollars and untold numbers of hours in reliance upon the Bureau's representations that pay-out would terminate acreage limitations * * * *." [Finding 24].
>
> "Therefore, the water users were in the position of having paid almost half of the capital cost obligation for the acquisition of permanent storage rights in Pine Flat Dam in reliance upon assurances that the use of those rights would not be subject to acreage limitations after the balance of their respective shares of the capital cost obligations had been fully repaid. * * * *" [Finding 25].
>
> "To permit the Government to reverse its position as to the effect of pay-out would mean that the Kings River water users paid out millions of dollars in reliance to their detriment upon a legal interpretation repeatedly reaffirmed to them by the Government * * *." [Finding 26].

There is ample evidence in the Record to support these Findings that there were "repeated assurances" by Interior Department officials to the Kings River interests that a "lump-sum" payment of the allocated portion of the construction cost would terminate the acreage limitation provisions. See, for example, the letter of October 21, 1952 from the San Joaquin Valley District Manager of the Bureau of Reclamation to the Kings River Conservation District stating:

> "* * * we also have assured you that the proposed lump-sum payment contract, which you requested and we furnished, would remove the excess land restrictions of Reclamation Law * * *." (PART TWO of the "1956 Study", Exhibit 27)

See also Assistant Secretary of Interior Aandahl's letter of May 19, 1954 to Mr. William F. Docker, counsel for the Kings River interests, stating that the contract will provide the water users with an option "to make a lump sum payment in advance" and that "the excess land laws become inoperative upon payment in full." (Exhibit 34 in PART TWO of the "1956 Study"). See also Secretary McKay's letter of October 20, 1955, to Mr. Eugene E. Marsh, attorney for a Kings River landowner, stating:

> "* * * lump sum payments * * * will permit existing large landowners to comply with the provisions of the Reclamation Law without disposing of their excess land holdings." (Exhibit 41 of PART TWO of the "1956 Study".)

Another example of such assurances is the August, 1957 letter from the Solicitor of the Department of the Interior, Elmer Bennett, Esq. to the Kings River people stating:

> "* * * payment either in cash or over a period of time * * * will terminate the excess land provisions of the Federal reclamation law * * *." (Ex. H4; R. T. 322).

These above-quoted Findings of Fact as to assurances by the Department of the Interior and reliance thereon by the Kings River interests, which are not even mentioned, much less overturned, by the Court of Appeals, entitled the defendant Tulare Lake Canal Company to an affirmance of the District Court's judgment as a matter of law. There is nothing whatever in the decision to suggest that these Findings are not supported by the evidence, or, on any theory, are clearly erroneous. These Findings of Fact stand today as a valid, unquestioned, and undisturbed determination that the defendant, Tulare Lake Canal Company, was entitled to judgment in its favor because of its reliance, to its substantial detriment, upon the repeated representations and assurances by officials of the Department of the Interior that when it paid its share of the allocated cost of construction, it would be free of the acreage limitation provisions of Reclamation Law.*

How this defense could have escaped the attention of the Court of Appeals is difficult to understand. It was clearly presented in the Defendant-Appellee's brief before the Court of Appeals (particularly at pages 59 and 60). Yet there is not a single word in the Court's lengthy opinion regarding this defense of "reliance".

The omission to deal with this defense was called to the attention of the Court of Appeals in the Petition of Tulare Lake Canal Company for a Rehearing (page 10) and also in the Petition for Rehearing filed on behalf of the Intervenor-Defendants, Tulare Lake Basin Water Storage Basin District and Salyer Land Company (pages 5 and 6). The Court's "Order on Petition for Rehearing" (Pet. App. Ex. B; 535 F.2d 1143) still ignored this defense.

It is particularly strange that the Court of Appeals for the Ninth Circuit should have ignored this defense of reliance as that Court has repeatedly held in recent years that when a citizen has

*Similar assurances were made to and relied upon by most, if not all, of these *amici curiae*.

relied upon assurances of Government officials as to interpretations of the law, those assurances cannot later be repudiated if to do so would substantially injure the citizen who had relied upon them. In the case of *Brandt v. Hickel* (1970), 427 F.2d 53, for example, the Court of Appeals for the Ninth Circuit put the matter very succinctly:

> "To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great Government." (At page 57).

The failure of the Court of Appeals to deal with this defense of reliance must mean that the Court had no answer to it.

Here again, in reversing a judgment without even considering an alternative ground for affirmance established by the District Court Findings of Fact, the Court of Appeals for the Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings" as to call for the Supreme's Court supervision.

CONCLUSION

Amici Curiae believe that a writ of certiorari should issue herein, *First*, because the Court of Appeals has decided extremely important questions of Federal Law which have not been, but should be, settled by the Supreme Court, *Second*, because the decision

of the Court of Appeals interpreting Federal Law is in conflict with applicable decisions of the Supreme Court, and *Third*, because in three respects the Court of Appeals has departed so far from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court's power of supervision.

Dated: December 3, 1976.

Respectfully submitted,

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(Appendix follows)

Appendix

Findings of Fact, Conclusions of Law and Judgment Entered by the District Court in This Case.

The Court having issued its Memorandum and Order in this proceeding on January 6, 1972, holding that the Government's request for an injunction is denied, because reclamation laws do not apply to water stored behind the Pine Flat Dam, and if they did, pay-out relieved defendant of the 160-acre limitation, now makes its findings of fact and conclusions of law, as follows:

Findings of Fact

1. This suit was brought by the United States for an injunction against defendant, Tulare Lake Canal Company, to restrain it from delivering water stored in Pine Flat Dam and Reservoir (herein referred to as Pine Flat Dam) to lands held by a single owner in excess of 160 acres. Defendant is a California water company which delivers to its stockholders, through canals and works owned by it, Kings River water appropriated under vested, nonappurtenant water rights for use in irrigation. The lands owned by defendant's stockholders and served by defendant are located within the Tulare Lake Basin, hereafter described. Defendant admits that it has delivered, and unless the law forbids will continue to deliver, water stored in Pine Flat Dam to its stockholders for the irrigation of lands in excess of 160 acres in single ownership. Defendant is one of 28 entities which have contracted with the United States for the exclusive and perpetual storage use of Pine Flat Dam for irrigation purposes, such contracts in the aggregate exhausting the entire capacity of Pine Flat Dam for the storage of water for irrigation purposes.

2. Intervenor defendants in the proceeding are Tulare Lake Basin Water Storage District and Salyer Land Company. The former is one of the 28 contracting entities referred to and the latter owns and operates for agricultural purposes lands in excess

of 160 acres within the Tulare Lake Basin. A brief *amici curiae* was presented jointly in behalf of Alta Irrigation District, Fresno Irrigation District, Consolidated Irrigation District, Kings River Water District, Laguna Irrigation District (all Kings River contracting entities) and Kaweah Delta Water Conservation District, Lower Tule River Irrigation District and Tule River Association (entities interested through their participation in similar projects on the Kaweah and Tule Rivers).

3. Pine Flat Dam was constructed on the Kings River in California, about 25 miles easterly of the City of Fresno, and was completed in 1954. Pine Flat Dam was constructed and is, and always has been, operated by the Army Engineers pursuant to Section 10 of the Flood Control Act of 1944 (58 Stat. 891, 901). Pine Flat Dam, as determined by Congress, is primarily for flood control purposes but with important incidental irrigation uses. In 1963 the 28 Kings River entities entered into the contracts with the United States, previously referred to, by which they obtained for the first time a contractual right for the permanent use for irrigation storage purposes of Pine Flat Dam. In return, the 28 contracting entities paid, or agreed to pay, the cost of Pine Flat Dam allocated to irrigation uses, as determined by law, in the total amount of $14,250,000. Under these contracts, the 28 entities also agree to pay, and have paid, $750,000 to the United States for a conveyance, and the United States has conveyed to said entities as tenants in common, "for irrigation purposes and other beneficial agricultural uses free and clear of all encumbrances of every name and nature, any and all right, title, or interest [the United States] now has or claims to have in and to the water of Kings River," as set forth in Conveyance and Covenants in Compromise and Settlement of Fresno Slough Claims, No. 14-06-200-699-A.

4. Defendant, as one of the 28 contracting entities, entered into Contract No. 14-06-200-691-A with the United States on

December 23, 1963. Simultaneously with the execution of said contract, defendant paid to the United States the entire balance owed by it for such irrigation storage rights and for the conveyance of the United States' claims to Kings River water for irrigation uses, referred to in the preceding paragraph.

5. By its contract, including specifically Article 8(e) thereof, defendant assumed no obligation with regard to the delivery of stored water to lands held in excess of 160 acres in single ownership unless and to the extent that such obligation was required by the then-existing laws of the United States. It is the Government's contention in this proceeding that said laws apply general reclamation law, and specifically Section 46 of the Omnibus Adjustment Act of 1926 (44 Stat. 649, 43 U.S.C. § 423e), to the irrigation use of Pine Flat Dam and do forbid the delivery of stored water to such so-called excess lands. It is defendant's contention, in which the intervenors and *amici curiae* join, that the laws of the United States contain no requirement that general reclamation law is applicable to the irrigation storage use of Pine Flat Dam. Further, it is defendant's contention, in which intervenors and *amici curiae* join, that even if the so-called acreage limitation of reclamation law did initially apply to the irrigation storage use of Pine Flat Dam, that limitation was extinguished as to defendant when, on December 23, 1963, it completed payment to the United States of its entire share of the capital cost of Pine Flat Dam. The United States, in turn, denies that such pay-out has this effect.

6. The case was tried in Fresno during the period extending from Tuesday, May 4, 1971, to Friday, May 14, 1971, both inclusive. Twelve witnesses testified in person in behalf of defendant, and two witnesses testified by deposition in behalf of defendant and intervenor Tulare Lake Basin Water Storage District. Various stipulations of fact were entered into by the parties and approved by the Court. No witnesses appeared for the United States. Over 700 documentary exhibits were received in evidence. Following

extensive briefing by all parties and *amici curiae,* oral argument was held before the Court on September 2, 1971.

7. Prior to 1944, both the Army Engineers and the Bureau of Reclamation had made studies of the proposed Pine Flat Dam project and submitted them to the Congress. The Congress decided in favor of having the project built and operated by the Army Engineers, and Section 10 of the 1944 Act expressly referred to and adopted the report of the "Secretary of War and the Chief of Engineers," said report being referred to as House Document Numbered 630, Seventy-Eighth Congress, Third Session. The adoption of the report was subject to only one limitation, not pertinent here. No proposal for or mention of the application of reclamation law or acreage limitation to Pine Flat Dam was contained in this report adopted by Congress. Section 10 of the 1944 Act further expressly provided that payment for irrigation uses should be arranged for by the Secretary of War, payment to the United States to be made "either in lump sum or annual installments". The aforementioned repayment obligation of $14,250,000 was determined by the Secretary of War in accordance with the procedures of applicable law. Payment of this amount by the water users under their contracts will fully reimburse to the United States the capital costs of the project allocated in accordance with law to irrigation storage use.

8. The report of the Army Engineers informed the Congress that all of the waters of the Kings River available for irrigation purposes were fully appropriated by the water users; that they had developed approximately 850,000 acres in the Kings River service area with their own private funds; and that they had built and owned a complete system of canals and other works which were used for distribution of water diverted from Kings River for irrigation purposes. The Army Engineers expressed the view that the project was primarily for flood control, with incidental, although important, irrigation benefits, consisting of capacity for the storage

of water to be used for irrigation. The Bureau of Reclamation's report to Congress recognized that no new lands would be developed by the construction and operation of the project, and the House Flood Control Committee Report found that irrigation benefits from the project "would accrue to land now already developed without bringing into production additional arid land".

9. In the Congressional hearings many Kings River water users testified, supporting the report of the Army Engineers in preference to that of the Bureau of Reclamation. Among the many facts developed, the testimony showed that about 200,000 acres at the southern limit of the Kings River service area, known as the Tulare Lake Basin, were subject to periods of extensive flood and to other periods of intensive drought; that well water was not available in important areas of the Basin for either irrigation or domestic uses; that the Basin contained practically no dwellings for residential purposes; that water conditions in the Basin were suitable for large-scale farming operations, but not for permanent farm homes; and that subdivision and settlement of the area would be hazardous and unwise. At the time of the June, 1943, hearings, it was pointed out to the Congress that 112,000 acres of the Tulare Lake Basin were then flooded, to an average depth of 14.5 feet. Testimony by the Commissioner of Reclamation recognized "there is no water to be developed . . . our studies indicate that the complete normal run-off . . . [is] now under State law allocated to individuals and agencies in the region, and we cannot interfere with that".

10. The evidence at the trial supports the various factual statements set forth in the report of the Army Engineers, the report of the Bureau of Reclamation and in the testimony before the congressional committees, as and to the extent outlined in Paragraphs 8 and 9, above, and the Court hereby finds accordingly. These factors influenced the Congress in enacting the Flood Control Act of 1944 and thereby authorizing Pine Flat Dam as a flood control

rather than a reclamation project. Further, the evidence at the trial compels the finding that the situation, above described, continues to exist at the present time. That is, the project is primarily a flood control project; the United States has conveyed to the water users any and all right, title or interest it had or claimed to have in and to the water of Kings River, as set forth above in Finding No. 3, and Pine Flat Dam has not developed any new or supplemental water supply which can be sold by the United States; all rights to the use of Kings River water for irrigation purposes and other beneficial agricultural uses are vested in the local water users; arid lands have not been reclaimed within the Kings River service area as the result of the construction and operation of Pine Flat Dam; the lands have been developed and the complete distribution system of canals and ditches are owned by the local water users; no canals, ditches or other distribution works have ever been built by the United States or with any federal assistance; and because of flooding, drought, soil conditions and inadequate domestic and irrigation water supplies, the 200,000 acres known as the Tulare Lake Basin are not adaptable to actual settlement by family farmers in 160-acre or 320-acre parcels as contemplated by the federal reclamation laws. The evidence shows that even at the time of trial in May, 1971, some 27,000 acres of Tulare Lake Basin were yet under flood waters remaining from the massive inundation of 89,000 acres during the 1968-1969 run-off season and that, in addition to substantial crop loss and flood fighting expense, further substantial costs were yet to be incurred in bringing such land back into production. Earlier, in the 1966-67 run-off season, another substantial flood struck Tulare Lake Basin. Two other instances of flooding in Tulare Lake Basin have occurred since Pine Flat Dam was completed in 1954. The Government's contention that reclamation law is applicable because of the irrigation benefits provided by Pine Flat Dam to the water users in the service area is without merit.

11. Officials of the Bureau of Reclamation in California concluded in studies and recommendations, completed in 1947, that it was not feasible to attempt to apply the acreage limitation provisions of reclamation law to the Tulare Lake Basin. The United States did not contend in this proceeding, and never has contended, that reclamation law and acreage limitation were intended by Congress to apply to some parts of the Kings River service area and not to other parts. It contends, as does defendant, that Congress intended the same law to apply to the entire area.

12. Contrary to the Government's contention that the language of Section 8 of the Flood Control Act of 1944 (58 Stat. 891), supported by its legislative history, requires the application of reclamation law to Pine Flat Dam, the Court finds that Congress intended that Section 8 of the Flood Control Act of 1944 (58 Stat. 891) make reclamation law and the acreage limitation prescribed by reclamation law applicable to Flood Control projects only where a new or supplemental water supply would be developed by the project which would be owned and could be sold by the United States for irrigation purposes through canals and ditches constructed by the Bureau of Reclamation; and Congress did not intend to make reclamation law or the acreage limitation prescribed by reclamation law applicable to projects authorized and constructed under said Flood Control Act of 1944, consisting of dam and reservoir projects constructed by and operated under the direction of the Secretary of War, unless and until: (a) the Secretary of War has determined upon recommendation by the Secretary of the Interior that such a project might be utilized for irrigation purposes; (b) the Secretary of the Interior has made a report and finding that additional works in connection with such project are necessary for irrigation purposes; and (c) there has been specific authorization of such additional works by an authorization act of Congress. The Court finds further that no new or supplemental water supply has been or is to be developed by Pine Flat Dam

which can be sold by the United States; that no water stored in Pine Flat Dam has been or is to be delivered for irrigation purposes through canals and ditches constructed by the Bureau of Reclamation; that the Secretary of the Interior has made no recommendation, as contemplated by Section 8 of the 1944 Act, regarding the utilization of Pine Flat Dam for irrigation purposes and no determination based upon any such recommendation has been made by the Secretary of War; that the Secretary of the Interior has not made any report and finding that additional works in connection with Pine Flat Dam are necessary for irrigation purposes; that there has been no authorization of any such additional works by any authorization act of Congress; and that said Section 8 of the Flood Control Act of 1944 does not make reclamation law applicable to the Pine Flat Dam project. The Court further finds that the irrigation use of said project was prescribed by Congress in Section 10 of said Flood Control Act of 1944.

13. Although Section 10 of the 1944 Act directed the payment for conservation storage in Pine Flat Dam be arranged by the Secretary of War, the payment contracts between the United States and the Kings River water users were negotiated by the Bureau of Reclamation pursuant to a directive from the President of the United States. This directive, however, could not, and did not, change the law applicable to the project as provided by Congress. In 1967, in connection with certain legislation pertinent to the Kings River, the Senate Committee on Interior and Insular Affairs observed in Senate Report No. 837, Ninetieth Congress, First Session:

> "The Secretary of the Interior was not 'delivering water' and, in fact, did not even have a project. The Kings River people owned the water and the Corps of Engineers constructed and operated dam and reservoir. The Department of the Interior was merely the contracting agency for the United States . . ."

The evidence at the trial supports the foregoing statements of the Senate Interior and Insular Affairs Committee, and the Court so finds.

14. The following findings are concerned in particular with the second issue in the case: Whether, even assuming that reclamation law and the 160 acre limitation initially applied to the irrigation use of Pine Flat Dam and the lands served by defendant with "stored water," payment in full of defendant's capital obligation with respect to Pine Flat Dam, which occurred on December 23, 1963, extinguished the application of the acreage limitation with respect to the land served by defendant. In regard to this issue, it was defendant's contention that final payment in full of the repayment obligation of a contracting entity for the irrigation benefits of a project whether in lump sum at the beginning of a contract period or whenever it might occur, relieved that entity from the excess land provisions of federal reclamation law. Plaintiff, however, contended that advance payment in full of the repayment obligation of a contracting entity for the irrigation benefits of a given project does not relieve that entity from the excess land provisions of federal reclamation law. The findings which follow this statement and support defendant's contention on this issue should be read in connection with the preceding findings.

15. Plaintiff contended that Section 3 of the Act of August 9, 1912 (37 Stat. 266, 43 U.S.C. Section 544) did not modify what it conceives to be the basic objective of the excess land provisions of federal reclamation law. Said Section 3 provides in part as follows:

> That no person shall . . . acquire, own, or hold irrigable land for which entry or water rights application shall have been made under the said reclamation act of June seventeenth nineteen hundred and two and acts supplementary thereto and amendatory thereof, before final payment in full of all installments of building and betterment charges shall have been made on account of such land in excess of one farm

> unit as fixed by the Secretary of the Interior, as the limit of area per entry of public land or per single ownership of private land for which a water right may be purchased respectively, nor in any case in excess of one hundred and sixty acres, nor shall water be furnished under said acts nor a water right sold or recognized for such excess; but any such excess land acquired at any time in good faith by descent, by will, or by foreclosure of any lien may be held for two years and no longer after its acquisition;

The Court finds and so rules that said Section 3 expressly limits the acreage limitation provisions in Section 5 of the Reclamation Act of June 17, 1902 (32 Stat. 387) to the period before "final payment in full" of the pertinent contractual repayment obligations relating to an irrigation project. This provision was interpreted by Chief Counsel King, of the Bureau of Reclamation in his opinion of July 1, 1914 (43 L.D. 339), to "permit the furnishing of water for land on which payment in full has been made of building and betterment charges even when more than 160 acres of such land is owned by one person." This provision and interpretation were consistent with the 1902 Act, and were carried forward in subsequent acts such as Section 13 of the Reclamation Extension Act of August 13, 1914 (38 Stat. 690, 43 U.S.C. Section 443).

The King opinion was promptly accepted and promulgated by the Department of the Interior. It was subsequently incorporated into Interior regulations in 1920 (27 L.D. 418), where it remains to this date (43 C.F.R. Section 230.65).

16. The practice of extinguishing acreage limitation upon final payment by a contracting entity, whether in lump sum at the beginning of a contract period, or whenever it might occur (often referred to as the "pay-out principle"), was according to the extensive evidence presented to this Court, the uniform practice of the Bureau of Reclamation and the Department of the Interior for 50 years. On December 26, 1961, for the first time, that practice was

held unlawful by an opinion of the then Solicitor of the Department of the Interior (68 I.D. 374). Thereafter, by contracts with the Kings River water users, the United States agreed to submit for binding judicial determination the issue of whether the laws of the United States require the application of acreage limitations in the circumstances presented by this case.

17. In the course of the hearings on the Kings River Project leading to enactment of the Flood Control Act of 1944, the Commissioner of Reclamation acknowledged to Congress that the jurisdiction of the Bureau of Reclamation over the distribution of irrigation water would terminate upon the completion of pay-out. During the period 1945 through early 1961, four Solicitors of the Department of the Interior held that full repayment by a contracting entity terminates the application of acreage limitation to that entity [Fowler Harper's Memorandum opinion of August 21, 1945; Associate Solicitor Cohen's opinion (M-35004), October 22, 1947; Solicitor Elmer Bennett's opinion (M-36457), July 10, 1957 and Memorandum of October 17, 1957; Solicitor Theodore Stevens' opinion (M-36611), January 3, 1961]. Two of the Solicitors' opinions (Bennett and Stevens) related specifically to the Pine Flat Dam project. In addition, statements by three successive Secretaries of the Interior also confirmed the pay-out principle to Congress and the Kings River water users [e.g., Secretary Chapman, November 2, 1950; Secretary McKay, March 2, 1954; Secretary Seaton, July 12, 1957, October 27, 1957]. The earliest of these, by Secretary Chapman in 1950, represented to Congress that the pay-out principle was incorporated into the 1944 Flood Control Act's authorization of the Pine Flat project by the provision in Section 10 for repayment for conservation storage benefits in "lump sum or annual installments".

18. In 1956 the Department of the Interior prepared and submitted to the Chairman of the Public Works and Resources Subcommittee of the Committee on Government Operations, House of

Representatives of the Congress of the United States, a two-volume study entitled "Excess Land Provisions of the Federal Reclamation Laws and the Payment of Charges." This study related expressly to the Pine Flat Dam and the Kings River water users. It was addressed to the legality under reclamation law of a draft contract with the Kings River water users which provided for release of acreage limitations upon final pay-out of the capital charges allocated to the water users. The study, transmitted to the congressional subcommittee by the Under Secretary of the Interior, traced the practice of the Bureau and Department with respect to the pay-out doctrine from 1902 to 1956. The study included numerous exhibits verifying the practice stated and the conclusions reached. The final paragraph of the Department's summary statement, extending from pages 1 to 56, both inclusive, of volume one of the study, concludes as follows at page 56:

> The proposal contained in the repayment contract arrangement negotiated with the Kings River Conservation District is simply that when and to the extent construction charges repayable under that contract are paid to the United States, the lands with respect to which full payment is made will no longer be subject to the excess land limitation of the federal reclamation laws. Development of this phase of the proposed contract constitutes the application of a principle which is consistent with a policy of long standing and which is compatible with the construction of Acts of Congress as they have been interpreted by administrative officials and legal staffs of the Department over a long period of years.

'Volume two of the 1956 Study presented to Congress contains numerous letters and correspondence from the Department of the Interior pertaining to the determination and assurances that pay-out by Kings River contracting water users terminates application of acreage limitations. Furthermore, the evidence of record contains numerous other documents of the same nature issued by the Department up to and including the year 1961.

19. The draft contract with the Kings River water users incorporated in the study provided for the extinguishment of acreage limitation upon complete pay-out by the contracting entity or by a landowner. In the latter situation, final payment by the landowner consisted of the capital charges applicable to his land. The contract between the United States and the defendant of December 23, 1963, involves final payment by the contracting entity, itself, which payment, as previously stated, was made, in full, on December 23, 1963. The above-quoted statement of the Department of the Interior in paragraph 18 covers conclusively the principle of pay-out and release of acreage limitation involved in the defendant's contract of December 23, 1963.

20. This study and the views expressed therein endorsing the pay-out principle were widely disseminated by the Department of the Interior when presented to Congress in 1956. Congress did not reject this interpretation of reclamation law, but, to the contrary, it enacted general reclamation legislation, the Small Reclamation Projects Act of 1956 (70 Stat. 1044, 43 U.S.C. § 4223), based upon and expanding the principle by providing that payment of the capital component, or of interest thereon, attributable to excess lands on a project completely displaces the application of acreage limitation to such lands. Congress had also recognized in the Russian River project authorization of the Flood Control Act of 1950 (64 Stat. 170) that lump sum payment for irrigation benefits obviated the application of acreage limitation to excess lands in a project coming within the provisions of Section 8 of the Flood Control Act of 1944.

21. The record contains an enormous amount of evidence, in addition to the 1956 Study, verifying the Department of the Interior's consistent practice on reclamation projects or recognizing that acreage limitation terminates upon final payment of capital charges. A Bureau of Reclamation survey report on landownerships on federal reclamation projects and laws applicable thereto pub-

lished in 1946 verifies that the pay-out principle was consistently recognized in the administration of reclamation projects constructed prior to the enactment of the Flood Control Act of 1944. The parties have stipulated as to the existence and as to the pertinent pay-out provisions contained in some 100 contracts on numerous reclamation projects, verifying this practice. Many of these contracts were specifically approved by Congress pursuant to Section 7(c) of the Reclamation Project Act of 1939 (53 Stat. 192, 43 U.S.C. § 485f). The plaintiff, however, contended that no instances were shown of actual advance lump sum pay-out, but the court finds that this attempted distinction is of no significance and that under the rationale for the practice, it is immaterial whether full payment is made at the outset or at a later time.

22. Moreover, the Court notes that the Government, in response to one of defendant's interrogatories, stated that it knew of no instance where final payment of construction charges allocated to irrigation benefits had been made and acreage limitation had continued to be thereafter enforced. Similarly, the Court was advised of no instance wherein final payment, in lump sum or on an accelerated basis, had been refused by the United States. As to the latter, in any case, the Court has noted that Section 10 of the 1944 Act, applicable to Pine Flat Dam, expressly authorizes "lump sum" payment, and full payment has been made to the United States by the defendant, Tulare Lake Canal Company.

23. The 1959 report of the Committee on Interior and Insular Affairs of the House of Representatives, the committee of the House having cognizance over reclamation matters, on the bill which authorized the so-called San Luis project in California, House Report No. 399, Eighty-Sixth Congress, First Session, referred to the pay-out rule as documented in the aforementioned 1956 Study presented to Congress pertaining to Kings River and Pine Flat Dam and as applied theretofore, in the following terms:

"During the period when irrigation water contracts were entered with individuals rather than organized districts, it is thus clear that the law forbade delivery of water to no more than one farm unit held by an individual only so long as the entire construction cost allocated to the excess unit had not been paid in full. That the law was so read and applied by the Interior Department as shown in detail in the Bureau of Reclamation's printed publication entitled "Landownership Survey on Federal Reclamation Projects" (1946) and the Interior Department's two-volume document prepared for the Subcommittee on Public Works and Resources of the House Committee on Government Operations entitled "Excess Land Provisions of the Federal Reclamation Laws and the Payment of Charges" (1956).

"The same rule has been held to be applicable to irrigation district contracts . . .

"The present Secretary of the Interior has, in effect, announced his concurrence in this view of the law. On July 12, 1957, he said . . .

> 'The Department continues to recognize and support the basic concept of reclamation law that full and final payment of the obligation of a district to the Federal Government ends the applicability of the acreage limitations—

and added—

> 'So long as the present acreage limitations remain in the basic reclamation law, they should be complied with, until the district has fully discharged its obligations to the Federal Government.'

". . . Whatever may be the merits or demerits of continuing to apply the prevailing construction of the 1912 and 1926 acts to irrigation districts in situations in which, although final payment is made only after a period of years during which they received the benefits of interest-free Federal money and, in many cases, assistance from power revenues, it remains true that (1) the administrative practice of doing so is now so well fortified by history that it can

probably be successfully attacked by no one except Congress and (2) that there is no legislation now pending before Congress, nor has any ever been introduced, which would overrule the departmental interpretation of these acts or provide other standards to guide it."

The Court adopts the foregoing committee statement as a finding fully supported by the evidence in this proceeding.

24. As the evidence establishes, the Kings River water users relied upon numerous and repeated assurances made to them by the Bureau of Reclamation and the Department of the Interior that, even though acreage limitation initially applied to the irrigation use of water stored in Pine Flat Dam, such acreage limitation would no longer apply to any Kings River contracting entity after it made final payment of capital charges, such as was done by the defendant in this case. If pay-out has not the effect of extinguishing acreage limitation, the position of the Kings River water users and this defendant would be most seriously prejudiced. The Kings River water users, including the defendant herein, have expended millions of dollars and untold numbers of hours in reliance upon the Bureau's representations that pay-out would terminate acreage limitations under applicable law.

25. For example, beginning in early 1954 and continuing through 1963, the Kings River water users availed themselves of the storage facilities of Pine Flat Dam for irrigation purposes under annual interim contracts. Under such contracts, the water users, including defendant herein, paid amounts for water storage for exceeding the operation and maintenance costs allocated to irrigation use. The water users, including defendant herein, were allowed credits toward the $14,250,000 capital cost repayment obligation for the amounts paid under these interim contracts in excess of annual operation and maintenance costs allocated to irrigation use, but these credits were contingent upon their ultimate execution of permanent contracts. The credits amassed through

1963 amounted to $6.8 million, or almost one-half of the total repayment obligation for irrigation storage use of Pine Flat Dam. Therefore, the water users were in the position of having paid almost half of the capital cost obligation for the acquisition of permanent storage rights in Pine Flat Dam in reliance upon assurances that the use of those rights would not be subject to acreage limitations after the balance of their respective shares of the capital cost obligations had been fully repaid. Had the water users foregone the irrigation storage use of the Dam after the Department of the Interior disavowed the applicability of the pay-out principle, they would have forfeited these substantial payments already made toward permanent storage rights.

26. To permit the Government to reverse its position as to the effect of pay-out would mean that the Kings River water users paid out millions of dollars in reliance to their detriment upon a legal interpretation repeatedly reaffirmed to them by the Government and commended to them by long-standing interpretation and application of the law over the course of at least 50 years. The Court is not aware of a clearer case of substantial reliance by citizens upon the Government's contemporaneous and long-standing administrative interpretation and application of federal law, which is fully supported by the statutes enacted by Congress.

27. All of the findings of fact set forth in the Court's Memorandum and Order of January 6, 1972, are incorporated herein to the extent not above included.

Conclusions of Law

1. Section 10 of the Flood Control Act of 1944 authorizes Pine Flat Dam to be constructed and operated by the Army Engineers under supervision of the Secretary of War [now Army] for flood control and other purposes, including irrigation storage use, and does not direct or authorize the application of federal

reclamation law or the 160-acre limitation to the irrigation storage use of that facility.

2. It is infeasible and would produce bizarre and absurd consequences if an attempt were made to impose acreage limitation and family-farm settlements within the Tulare Lake Basin.

3. The Laws of the United States, and particularly Section 8 of the Flood Control Act of 1944, do not make federal reclamation law applicable to a dam and reservoir project authorized by said Flood Control Act and operated under the direction of the Secretary of War unless and until: (a) the Secretary of War has determined upon recommendation by the Secretary of the Interior that such a project might be utilized for irrigation purposes; (b) the Secretary of the Interior has made a report and finding that additional works in connection with said project are necessary for irrigation purposes; and (c) there has been specific authorization of such additional works by an authorization act of Congress. None of the foregoing conditions having been satisfied, Federal reclamation laws, including the acreage limitation provisions thereof, have no application to the irrigation storage use of Pine Flat Dam.

4. Federal reclamation laws provide an example of the type of legislation, comprising numerous separate enactments over a period of many years, which must be read as a composite whole. A later enactment does not supersede an earlier enactment unless Congress has expressed its intent to this effect or unless there is a necessary conflict between the later and earlier enactments. Section 3 of the Act of August 9, 1912, and other provisions of statute law recognizing that acreage limitation terminates upon final pay-out of capital costs by a contracting entity are not in conflict with Section 46 of the Omnibus Adjustment Act of May 25, 1926, or any other reclamation law. Federal reclamation laws, even if applicable, do not apply acreage limitation after an entity contracting with the United States completes full and final pay-

ment of its contractual obligation for reimbursable capital costs allocable to irrigation benefits.

5. Administrative interpretation and application by the agency charged by Congress with the administration of a pertinent law, particularly, as here, where such administrative interpretation is contemporaneous with the enactment of the statute involved and the application of that interpretation is thereafter uniform and long-continued, are entitled to great weight by the federal judiciary. An administrative agency may not reverse itself and change such interpretation and application unless the statute plainly does not admit of the interpretation and application previously given it. These principles of law apply with peculiar force in a situation, such as the present one, where citizens have relied at vast expenditure of money and time upon repeated Government assurances of the correctness of its interpretation and administration of the acts of Congress involved, and where Congress, both by acceptance and affirmative action, has repeatedly approved such interpretation and administration.

6. The laws of the United States, as of December 23, 1963, the date of Contract No. 14-06-200-691-A between defendant and the United States for irrigation storage rights in Pine Flat Dam, did not prohibit, and have not prohibited at any time thereafter, the delivery of stored water from Pine Flat Dam to the excess lands of a large landowner who has not executed a recordable contract under federal reclamation law.

7. Pursuant to Article 8(e) of Contract No. 14-06-200-691-A, all the provisions of Article 8 of said contract, purporting to impose a prohibition against defendant's delivery of stored water from Pine Flat Dam to excess lands of a large landowner who has not executed a recordable contract, are void *ab initio* and of no effect.

8. All of the conclusions of law set forth in the Court's Memorandum and Order of January 6, 1972, and in the fore-

going findings of fact, are incorporated herein to the extent not above included.

9. Plaintiff is not entitled to the injunction prayed for in its complaint. Defendant and intervenors are entitled to judgment in their favor.

Dated: Mar 15, 1972.

M. D. CROCKER
United States District Judge

JUDGMENT

This action having been tried before the Court, Honorable Myron D. Crocker, District Judge, presiding, a decision having been rendered by the Memorandum and Order entered herein on January 6, 1972, and findings of fact and conclusions of law having been entered by the Court;

IT IS ORDERED, ADJUDGED AND DECREED:

1. The laws of the United States and particularly Section 8 of the Flood Control Act of 1944 do not make federal reclamation law applicable to a dam and reservoir project authorized and constructed under said Flood Control Act and operated under the direction of the Secretary of War unless and until: (a) the Secretary of War has determined upon recommendation by the Secretary of the Interior that such a project might be utilized for irrigation purposes; (b) the Secretary of the Interior has made a report and finding that additional works in connection with said project are necessary for irrigation purposes; and (c) there has been specific authorization of such additional works by an authorization act of Congress.

2. Pine Flat Dam and Reservoir was constructed and is operated as a flood control project with incidental use for irrigation purposes under the authorization of Congress contained in Section 10 of the Flood Control Act of 1944. Because no subsequent determination was ever made by the Secretary of War upon recommendation of the Secretary of the Interior that the project could be utilized for irrigation, no finding and report by the Secretary of the Interior was ever made that the construction of additional works was necessary for irrigation purposes, no subsequent authorization act was ever passed by Congress for the construction of any such additional works for irrigation, no canals and ditches through which water is delivered for irrigation purposes have ever been built by the Bureau of Reclamation and no supplemental water has been developed which is owned and can be sold by

the United States, Section 8 of the Flood Control Act of 1944 does not make federal reclamation law, or the acreage limitation provisions thereof, applicable to the use of Pine Flat Dam and Reservoir for irrigation purposes.

3. Under the laws of the United States applicable to Pine Flat Dam and Reservoir and its use and operation for irrigation storage, neither defendant, nor intervenor defendant Tulare Lake Basin Water Storage District, is subject to any limitation or requirement of federal reclamation law that they refrain from delivering "stored water," as defined in their respective contracts with the United States, to lands in excess of 160 acres in single ownership unless and until the owner thereof executes a so-called recordable contract with the United States to sell such excess lands.

4. Defendant and intervenor defendant Tulare Lake Basin Water Storage District are not bound by the requirements of federal reclamation law in their delivery of water stored in Pine Flat Dam and Reservoir.

5. Federal reclamation law has no application to lands within the Kings River Service Area by reason of their receiving water from storage in Pine Flat Dam and Reservoir; and, therefore, no condition or limitation of said federal reclamation law can be imposed upon intervenor defendant Salyer Land Company as a requirement for its receiving water from storage in Pine Flat Dam and Reservoir.

6. Federal reclamation laws, even if applicable, do not apply acreage limitation after an entity contracting with the United States completes full and final payment of its contractual obligation for reimbursable capital costs applicable to irrigation benefits.

7. Even if federal reclamation law, and the acreage limitation provisions thereof, were applicable to the receipt of water from storage in Pine Flat Dam and Reservoir, defendant was relieved of any such restriction regarding the delivery of "stored water," as defined in its contract with the United States, to lands in excess of

160 acres in single ownership by its full payment of its repayment obligation under said contract on December 23, 1963.

8. As of December 23, 1963, and at all times thereafter, the laws of the United States did not and do not prohibit the delivery of stored water from Pine Flat Dam to excess lands of a large landowner unless said owner executes a recordable contract under federal reclamation law. The provisions of Article 8 of contract number 14-06-200-691-A, between defendant and the United States, are void *ab initio* and of no effect.

9. The prayer of the United States for a permanent injunction against defendant is denied, and judgment is entered in favor of defendant and intervenor defendants that the United States take nothing by reason of its claims herein.

Dated: Mar 15 1972.

M. D. CROCKER
Myron D. Crocker
United States District Judge

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